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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____

STATE OF CALIFORNIA,

Petitioner,

vs.

KENNETH T. McGREW,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The State of California requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered on the above-entitled cause on December 17, 1969.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California rendered on February 17, 1969, and reported as People v. McGrew, 269 A.C.A. 851, 75 Cal.Rptr. 378, is set out as Appendix B to this petition. The granting of a hearing by the Supreme Court of the State of California vacated that opinion. The opinion of the Supreme Court of the State of California affirming the trial court's order dismissing the action after having ordered the suppression of petitioner's evidence against respondent, rendered on December 17, 1969, is reported as People v. McGrew, 1 Cal.3d 404, 82 Cal.Rptr. 473, 462 P.2d 1, and is set out as Appendix A to this petition.

JURISDICTION

The Supreme Court of the State of California rendered its decision and judgment in this case on December 17, 1969. On January 19, 1970, the Supreme Court of the State of California issued its remittitur, thereby making final its judgment in this case.

The decision of the Supreme Court of the State of California in this case affirms the order of the Superior Court for the State of California dismissing the criminal action instituted by petitioner against respondent for felony narcotics offense under the laws of the State of California. The decision of the Supreme Court of the State of California in this case also affirmed the order of the Superior Court for the State of California suppressing all of the incriminating evidence which was in the possession of respondent and which was the basis for having instituted a criminal prosecution against respondent in the Superior Court of the State of California. Therefore,

the decision of the California Supreme Court of the State of California in this case is final and bars petitioner from taking any further action against respondent.

Petitioner invokes the jurisdiction of this Honorable Court under section 1257(3) of Title 28 of the United States Code and Rule 22 of the Rules of the Supreme Court of the United States, since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Under the Fourth Amendment to the Constitution of the United States as construed by this Honorable Court in Katz v. United States (1967) 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507, would a person who must, as conditions to a voluntary, bilateral contract with an interstate carrier, declare the contents of a trunk so that the carrier may determine whether it will accept it for shipment and, if so, what rate will be charged under a contract which incorporates a right on the part of the carrier, at its option, to inspect the contents of said trunk, have a reasonable expectation of privacy as to the agents of the interstate carrier and the contents of such a trunk, especially when, in addition, the interstate carrier is a commercial passenger airline which the general public would expect--if not demand--to inspect the contents of any trunk or parcel that the agents of the airline had any reason to believe contained a potentially dangerous device?

2. Are interstate carriers operating under the jurisdiction of the Civil Aeronautics Board to conduct their business according to the construction placed on the Fourth Amendment to the Constitution of the United

States by the Supreme Court of the State of California and the several states or by the United States Court of Appeals; if such a carrier were to do an act which did not violate a person's Fourth Amendment rights as construed by the United States Court of Appeals, could the carrier be subjected to a civil action in the courts of California for having violated the same person's Fourth Amendment rights based on the same act because the Supreme Court of the State of California has declared said act to be violative of the Fourth Amendment?

3. Is Rule and Regulation of the Civil Aeronautics Board, Number 96, rule 24 which states: "INSPECTION OF SHIPMENTS All shipments are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection." violative of the Fourth Amendment to the Constitution of the United States?

4. Must an agent of an interstate airline, operating under the rules and regulations of the Civil Aeronautics Board and terms and conditions of a voluntary, bilateral contract between the airline and a consignor, who by his independent conduct determines that the consigned freight is contraband subject himself to a possible felony arrest under the laws of the State of California in the interest of the consignor's purported Fourth Amendment rights when the consignor has no lawful right to possess the contraband and has delivered it into the possession of the airline's agent under the circumstances set forth in the first question as presented in this petition?

5. Does a person's effects have <u>more</u> protection under the Fourth Amendment under the circumstances set forth in the first question presented in this petition, than those same effects would have if they were in an automobile?

6. Under this Honorable Court's decisions in Katz v. United States, supra, 389 U.S. 347, and Zap v. United States (1946) 328 U.S. 624, 90 L. Ed. 1477, 66 S. Ct. 1277, and under the circumstances of this case, did respondent waive his rights under the Fourth Amendment?

7. If under the circumstances of this case it would not have been violative of the Fourth Amendment for the airlines to seize respondent's trunks at the request of state law enforcement agents, why was it violative of the Fourth Amendment for the airlines to permit state law enforcement agents to search the same trunks?

STATEMENT OF THE CASE

The grand jury for the County of San Diego indicted respondent, in count one, for transporting marijuana in violation of Section 11531 of the California Health and Safety Code, in count two, for possessing marijuana for sale in violation of Section 11530.5 of the California Health and Safety Code, both felony offenses. After pleading not guilty and waiving trial by jury, respondent brought a pretrial motion to suppress all evidence of the charged offenses under Section 1538.5 of the California Penal Code and to dismiss the indictment under Section 1385 of the California Penal Code. Both motions were granted by the trial court.

Petitioner appealed the trial court's dismissal of the indictment based upon its order suppressing the evidence. (California Penal Code, Section 1238, subdivision 7.) The Court of Appeal for the State of California, Fourth Appellate District, Division One, in a unanimous decision reversed the orders of the trial court in an

opinion reported as People v. McGrew (1969) 269 A.C.A. 851, 75 Cal.Rptr. 378. (See, Appendix B to this petition.) Respondent did not petition the Court of Appeal for a rehearing but did file a timely petition for a hearing of the case in the Supreme Court of the State of California.

The Supreme Court of the State of California granted respondent's petition for a hearing of the case, thereby vacated the prior decision of the Court of Appeal. The Supreme Court of the State of California, by a vote of 4 to 3, affirmed the trial court's order suppressing the evidence and the dismissal of the indictment in an opinion reported as People v. McGrew (1969) 1 Cal.3d 404, 82 Cal.Rptr. 473, 462 P.2d 1. (See, Appendix A to this petition.) On January 19, 1970, the Supreme Court of the State of California issued its remittitur thereby rendering its decision final.

STATEMENT OF FACTS

As its summary of the facts, petitioner sets forth the facts as stated by the Supreme Court of the State of California in its opinion in this case.1/

1/ People v. McGrew, supra, 1 Cal.3d, pp. 406-408, Appendix A, pp. A1 - A5. This statement, however, is inaccurate in one respect, namely, it seems to state that a "federal" narcotics agent arrived on the scene and took charge of the investigation. Though the reporter's transcript shows that a federal narcotics agent did make an appearance at the scene, the narcotics agent who performed those acts, etc., attributed to the "federal" narcotics agent in the California Supreme Court's majority

(Continued on next page.)

"McGrew brought a new, securely locked footlocker to the United Airlines freight service at the San Diego airport in the afternoon of June 25, 1967, to be shipped to San Francisco. The freight agent, one Dowling, observed that McGrew was wearing walking shorts and a T-shirt and had 'quite long' hair. Dowling's supervisor had told him 'to be on the alert for footlockers and suspicious people, and so on, that they had been shipping marijuana, * * * ' to check out any suspected contraband, to 'see what is in there, and if it is marijuana * * * call the police.' Dowling was suspicious, because of McGrew's 'general appearance,' and because the locker, which McGrew declared contained books and clothes, had an 'exceptional weight' of 112 pounds,

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(Continued from preceding page.)

opinion was an agent of the state, i.e., California Bureau of Narcotics Enforcement. This is more clearly shown in the facts as set forth by the California Court of Appeal in this case. (See, Appendix B, pp. B-2 - B-4.)

In this regard, petitioner believes the statement of facts set forth by the California Court of Appeal (Appendix B, ibid.) to be a fair and accurate statement. Nor, in petitioner's view, could respondent take issue with the Court of Appeal's statement since he did not petition that court for a rehearing. (See, Rule 29(b) of the California Rules of Court.)

although Dowling admitted that the weight was consistent with a shipment of two-thirds clothes and one-third books.

"After McGrew paid for the shipment and left, Dowling called his supervisor, who told him to open up the footlocker to see what it contained. Using a nail and hammer to knock out the hinge pins, Dowling opened up the locker 'a couple of inches,' just 'enough to see what was in there.' He observed several bricks or small packages, wrapped in brown paper or newspaper. He could not see the contents of the packages and he did not open any of them. He closed the lid of the footlocker and after calling his supervisor again, called the police.

"San Diego Police Officer Burgess came, and Dowling 'told him what had happened, and he said he would like to see [[the locker]].' Dowling 'took him back and opened it up and showed him' the footlocker. The officer removed and inspected one of the packages. A federal narcotics agent then arrived, removed and examined the packages, and decided that the packages contained marijuana. 2/

2/ The federal narcotics agent testified, Burgess did not. Dowling's testimony concerning the actions of Burgess is not challenged.

The officers inquired about fill, to weigh down the emptied footlocker, and Dowling furnished ballast. Using the ballast and one brick of marijuana, the officers repacked the locker for shipment to San Francisco.

"Dowling notified other airlines about McGrew and the shipment. About eight p.m. McGrew brought a blue footlocker, which he said contained books and dishes, to the Western Airlines freight service, where it was received by the freight clerk, one Case, who wrote up the airbill, and accepted the footlocker from McGrew. A fellow employee named Sweeney called United Airlines to tell them about the footlocker. The federal narcotics officer involved in the United Airlines transaction and two other officers went to the Western Airlines freight office. The footlocker was closed and locked. The federal narcotics agent 'detected an odor of marijuana' by compressing the top of the footlocker and asked Sweeney and Case to open it, although they 'were under no obligation to do so.' Sweeney and Case opened the footlocker, on the suggestion of one of the officers, by knocking 'the hinge pins out of the rear,' using a hammer and nail. Sweeney opened up the lid, and the federal agent removed and opened the packages, which were wrapped in brown paper. The footlocker was then repacked in the same manner as the one checked with United Airlines.

"About 11 p.m., McGrew returned to the Western Airlines counter, purchased a ticket for San Francisco, and checked a suitcase. Case notified officers and told them that he had last seen McGrew walking through the terminal in the direction of the restaurant. The officers, Case and Dowling, went to the restaurant and found McGrew sitting at the end of the counter. Both Case and Dowling identified him, and the officers placed him under arrest. An officer found a Western Airlines baggage claim ticket in searching the person of McGrew. The officer returned to the Western Airlines luggage counter with the baggage claim ticket and secured the suitcase. He opened it and found marijuana.

"The United Airlines employee, Dowling, testified that at the airlines training school he had been instructed that 'we had the right to inspect shipments;' that an agent could open 'anything that arouses your suspicions;' that the concern of the airlines was for 'aircraft safety,' for improperly declared goods going at a cheaper rate, and for overvalued goods, such as a TV set claimed to be good but in fact with 'the picture tube * * * kicked in.' He could not recall being instructed to check to see whether contraband was being shipped.

"He testified in connection with the McGrew search that he was not concerned about aircraft safety or rate structures:

that when he opened up the locker he was looking for one thing, to determine whether marijuana was contained in the locker. He did not, however, smell marijuana before opening the locker.

"He further testified that in searching the footlocker he was following his orders to assist the police; that he suggested and furnished ballast to the police in response to their inquiry about fill, to weigh down the emptied footlocker and that in so doing he was following his orders to assist the police; that before the McGrew incident, he had opened two other footlockers, in the presence of the police, having obtained the combination to the locks from the police; that he found contraband in the two lockers, and that he knew of two other footlockers having been opened by fellow employees, in which contraband was not found.

"The People stipulated that the officers did not have a search warrant for either search."

HOW THE FEDERAL QUESTIONS AROSE

In this case, the Supreme Court of the State of California held that because the marijuana itself was not in "plain view"[3/] of the law enforcement officer when he arrived at the airport, a search warrant was needed for the officer to search, i.e., look into, and to seize respondent's footlockers. The majority then made it clear that its holding on this point was predicated on the Fourth Amendment as construed by this Honorable Court; thus the majority held:

3/ In People v. Marshall (1968) 69 Cal.2d 51, 69 Cal.Rptr. 585, 442 P.2d 665, a majority of the California Supreme Court held that "plain view" meant what was apparent to the sense of sight, i.e., an object was not in "plain view" if it could be smelled or heard but not seen. The majority in Marshall held that marijuana in an opaque bag which police officers unquestionably knew to contain the marijuana because of prior informant received by a reliable information and because of the odor emanating from the bag was not in "plain view" to the officers and therefore the bag could not be searched, i.e., looked into, and seized without a search warrant. The bag in Marshall was found in an apartment which the police had lawfully entered for the purpose of finding and arresting the defendant; the police found no one in the apartment, but while looking for the defendant they found the bag. Citing decisions of this Honorable Court, the majority in Marshall held that there was no basis to conduct a search of the bag as found in the apartment since:

(Continued on following page.)

"Our decision in Marshall is not limited to dwelling houses. The Fourth Amendment protection of 'effects' includes securely closed footlockers shipped through common carriers. Neither the language of the Fourth Amendment, nor of any of the cases interpreting the protection of that amendment, suggest that warrants apply to 'houses' but not to 'effects.' The exceptions to the requirement of a warrant are based on circumstances and not on categories of items. The requirement of a warrant, unless otherwise excused, applies to whatever is protected by the Fourth Amendment. (See Katz v. United States, [supra, 389 U.S. 347, 356-357].)" (1 Cal. 3d 409-410; footnote omitted.)

(Continued from the preceding page.)

". . . 'There was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized.' [Citation.] 'They made no move to obtain a warrant of arrest or of search, although time permitted it.' [Citation.] '[[T]]here was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility.' [Citation.]" (Id., 69 Cal. Rptr. p. 591.)

It is also clear that the majority opinion of the California Supreme Court in this case relied upon the decisions of this Honorable Court and the United States Court of Appeals as the controlling authority for the proposition that respondent had not waived his rights under the Fourth Amendment. Thus, the majority in this case stated:

> "Corngold relied on Stoner v. California (1964) 376 U.S. 483, 489, which rejected the contention that implied consent of access for any purpose results in consent for all purposes: 'It is true * * * that when a person engages a hotel room he undoubtedly gives "implied or express permission" to "such persons as maids, janitors or repairmen" to enter his room "in the performance of their cuties." [[Citation.]] But the conduct of the night clerk and the police in the present case was of an entirely different order.'
>
> "In Corngold v. United States, supra, 367 F.2d 1, the court ruled that 'Appellant did not abandon his package; and mere surrender of custody to a carrier did not forfeit appellant's right to privacy. [[Citations.]] * * * Appellant's package, securely wrapped and tied, was delivered to the airline solely for transportation from Los Angeles to New York, and the inspection clause in TWA's tariff authorized examination only by the carrier itself.' (367 F.2d at pp. 7-8.)
>
> "Stoner and Corngold recognize that the scope of consent to an invasion of

privacy depends upon the circumstances. Other cases involving implied limited consent to an invasion of privacy make clear the significance of the circumstances. Thus, in United States v. Blok (D.C. Cir. 1951) 188 F.2d 1099, 1021, the police searched the desk of an employee; the court, in holding the search unlawful, stated: 'No doubt a search of [[the desk]] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use.' (See also, Cunningham v. Heinze (9th Cir. 1965) 352 F.2d 1, 5, cert. denied, 383 U.S. 968, following Stoner. Compare searches properly within the implied consent to search in People v. Plane, 274 A.C.A. 1, 4 [[landlord entered tenant's apartment to shut off lights and oven]]; In re Donaldson, 269 A.C.A. 593, 594 [[search of student's locker by school vice principal]]; People v. Rightnour, 243 Cal.App. 2d 663, 666 [[maid entered guest's room to clean up]]; People v. Gonzales, 182 Cal.App.2d 276, 277-278 [[search of knife-wounded victim by hospital personnel to determine identity]].)" (1 Cal. 3d, p. 411.)

That the majority opinion of the California Supreme Court draws into issue important questions of federal law is pointed up by the dissent in this case. Thus, the dissent on this point states:

"The majority lean heavily on Corngold v. United States (9th Cir. 1966) 367 F. 2d 1. In Corngold the transportation agent was initially contacted by government agents who directed him to a specific package and asked him to open it. Our case is factually closer akin to a more recent Ninth Circuit decision which carefully circumscribed the Corngold rule: Gold v. United States (1967) 378 F. 2d 588, in which at pages 590-591, the court held Corngold inapplicable to a situation in which the transportation personnel, with 'suspicions aroused * * * had no way to determine whether the contents were fit for carriage and properly classified except by opening them. This the carrier had the right to do under its tariffs.' Indeed, the instant case is stronger than Gold for here there was no prior direct contact between law enforcement officers and the airline employee. Dowling opened the footlocker at the direction of his company supervisor, not upon police suggestion.

"It was not a law enforcement agency but Dowling who notified other airlines about the defendant and his shipment. Pursuant to that warning Western Airlines employees Case and Sweeney observed the defendant's footlocker and called United to report. Fortuitously the police had then arrived at United and they proceeded from there to the Western offices. They noted the footlocker pointed out to

> them by the Western employees and could readily detect from it 'an odor of marijuana.' This justified the subsequent search and seizure. (See my dissent in People v. Marshall (1968) 69 Cal. 2d 51, 62.)
>
> "* * * * *
>
> "Since the airline employees had a legal right to inspect the footlockers, I can see no impediment to their advising the police of the presence of contraband and to the police taking possession of and making evidentiary use of the contraband displayed to them. Indeed, that was the precise situation in People v. Superior Court (1969) supra, 70 A.C. 129, in which a private detective gave a copy of a tape recording to law enforcement officers. We properly declined to suppress the evidence prior to trial. To the same effect is Wolf Low v. United States (9th Cir. 1968) 391 F.2d 61, 63, in which the court found proper the 'conduct of the airline in turning over to the Government the fruits of its search of the defendant's suitcases, and the conduct of the Government in making use of the information and evidence obtained by the airline's search * * *' (1Cal.3d, 415-417.)

It is clear, therefore, that this case points up the need for the state courts to understand the application of the

decisions of the United States Court of Appeal[4/] and of this Honorable Court[5/] in cases such as this one. It is also evident that the interstate carriers and other federal agencies have a need for a decision of this Honorable Court to guide them in the conduct of their affairs.

The majority of the California Supreme Court also ruled that there was no merit to petitioner's contention that under the facts and circumstances of this case the law enforcement authorities had a good faith basis to believe that the airlines agents had apparent authority to consent to a search of the footlockers which respondent had under his contract given to the airlines for shipment. On this issue, the dissent states:

> "As the majority concede, People v. Hill (1968) 69 Cal. 2d 550, 554, holds that a 'search is not unreasonable if made with the consent of a third party whom the police reasonably and in good faith believe has authority to consent to their search * * *.' The police belief was entirely reasonable and in good faith here, since it was founded upon the right legally conferred upon the airlines to inspect ship-

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4/ Specifically, Corngold v. United States, supra, 367 F. 2d 1; Gold v. United States, supra, 378 F. 2d 588; Wolf Low v. United States, supra, 391 F. 2d 61, cert. denied, 4 Cr. L. 4038.

5/ Specifically, Stoner v. California, supra, 376 U. S. 483; Cooper v. California, supra, 386 U. S. 58; Zap v. United States, supra, 328 U. S. 624; and Katz v. United States, supra, 389 U. S. 347.

> ments in their possession, the inspections actually made pursuant to that right, the discovery of contraband legally ineligible for shipment, the reporting of these events to the police and the disclosure to the police of the actual contraband." (1 Cal.3d, 417.)

Thus, the majority opinion of the California Supreme Court draws into issue the constitutionality of a rule of the Civil Aeronautics Board in the context of the Fourth Amendment; in Cooper v. California, supra, 386 U.S. 58, 61, this Honorable Court stated that a search authorized by state law may or may not be reasonable under the Fourth Amendment and in this case it is clear that the majority of the California Supreme Court held that a search such as that conducted in this case under the authority of a rule of the Civil Aeronautics Board is unreasonable under the Fourth Amendment. Petitioner contends that such a determination is a federal question which should be decided by this Honorable Court.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The decision below misinterpreted the protection afforded by the Fourth Amendment as construed by Katz v. United States (1967) 389 U.S. 347, in that the scope of Fourth Amendment protection in the decision below was determined by the subjective intent or purpose of the searcher rather than the reasonable expectation to privacy of the person's whose effects were searched.

In the decision below, a majority of the California Supreme Court, under the facts, stated that Dowling, an employee of United Airlines, testified that ". . . in connection with the McGrew search that he was not concerned about aircraft safety or rate structures; that when he opened up the locker he was looking for one thing, to determine whether marijuana was contained in the locker . . . " (1 Cal.3d, 408.) The majority then held that " . . . in the instant case, McGrew might have expected that an airlines employee would inspect where a danger or inconsistency was observed, but he could not reasonably be expected to anticipate police searches for contraband. He may not be held to have consented to searches by police officers totally unrelated to the interests of the airlines in hope that contraband may be discovered. [Citation.]" (1 Cal.3d, 412.) And, in this regard, later in its opinion the majority stated that " . . . [a]s pointed out above, the consent to inspection by the airlines was limited to consent for inspection for the airlines' own purposes." (1 Cal.3d, 413.)

Thus, although respondent may well have consented to an inspection of his footlocker by the airlines, if the airlines were to make such an inspection for its own purposes or because the airlines observed a "danger or inconsistency," in this case the airlines' agent searched respondent's footlocker solely because the agent believed it contained contraband, viz., marijuana. Therefore, the majority held that respondent could reasonably expect that if the airlines inspected the contents of his footlocker for its own purposes and learned the truth, i.e., that it contained kilos of marijuana instead of the declared "books and clothes," his effects, i.e., his marijuana, would remain secure from the police. This was so, according to the majority

because respondent " . . . may not be held to have consented to searches by police officers totally unrelated to the interests of the airlines in hope that contraband may be discovered. [Citations.]" (1 Cal. 3d, 412.)

Petitioner respectfully submits that this holding of the majority misses the point made by this Honorable Court in Katz v. United States, supra, 389 U.S. 347.

It misses the point in this case because under Katz the question is not whether respondent may have consented to a search by the police after the airlines had opened his footlocker and observed marijuana. The question in this case, in petitioner's view, is whether respondent had a reasonable expectation of privacy from the police as to the contents of his footlocker after the airlines for its own reasons opened it and observed marijuana.

A. Whatever the subjective motivation or private purpose of a search by an airlines' agent may be is irrelevant to whether a person has a reasonable expectation of privacy as to the contents of a trunk, etc., delivered into the hands of a passenger airlines for shipment on an airliner.

Petitioner respectfully submits that airlines should be able to search closed trunks or parcels which persons seek to have placed aboard an airliner. And such searches, under today's circumstances, should be deemed reasonable within the meaning of the Fourth Amendment.

If an airlines' agent--for any reason--has a suspicion that a parcel or trunk contains a bomb or a deadly

weapon, petitioner contends that the airlines should be able to search such a container to remove any doubt as to its contents. The average, i.e., reasonable, airlines customer would expect the airlines to do so; indeed, the average air traveler would probably demand that the airlines do so before such a passenger boarded an airliner for a flight.

Although counsel for petitioner would not, personally, enjoy an airlines' agent opening counsel's suitcase and searching through his dirty laundry, counsel would be irate if he learned that the airlines had suspected that his or another's luggage contained a bomb or a concealed weapon and permitted the luggage to be placed aboard the same airliner as counsel was to board and, yet, did not search the suspected luggage. Similarly, counsel would be irate if the airlines did not search an item of airfreight which was suspected of containing a destructive device and was placed aboard the same airliner that counsel was to board unless that item was searched to be certain that there was no danger.

True, in this case the airlines' agent did not suspect that respondent's footlocker contained a bomb or a weapon. But this fact, in petitioner's view, is irrelevant under the teachings of Katz.

It is irrelevant because it is not the subjective motivation or private purpose of a search by an airlines' agent but the reasonable expectation to privacy of the person's whose effects are searched that, under Katz, determines whether the effects are within the protection of the Fourth Amendment.

And petitioner respectfully submits that any person who delivers into the hands of a commercial

passenger airlines a trunk which is to be placed aboard a passenger airliner does and should not reasonably believe that the contents of such a trunk are secure from the scrutiny of airlines' agents.

Furthermore, a reasonable person would expect the airlines which searched a trunk because it suspected that it contained a bomb and which in fact found a bomb, to report it and deliver it to the police. Thus, a reasonable person would not only not expect that his trunk was secure from the scrutiny of airlines' agents but, also, would not in the event a bomb were found expect that it would be secure from the scrutiny of the police. And, on this premise, a reasonable person would not expect that a trunk which was searched by airlines' agents and which revealed narcotics instead of a bomb would be secure from the scrutiny of the police.

Therefore, in petitioner's view, footlockers such as were attempted to be shipped by respondent in this case are not protected by the Fourth Amendment as that amendment has been construed by this Honorable Court in Katz v. United States, supra, 389 U.S. 347, and the majority of the court below erred and misinterpreted the Fourth Amendment and this Honorable Court's decisions construing said amendment when it was held that the marijuana in respondent's footlockers were "effects" protected by the Fourth Amendment.

2. When a person who as a condition to a voluntary, bilateral contract with an interstate air carrier must declare the contents of a trunk so the carrier may determine whether it will accept it for shipment and, if so, what rate will be charged under a contract which

incorporates the right of the carrier, at its option, to inspect the contents of said trunk, such a person does not have a reasonable expectation of privacy as to the contents of said trunk.

It is clear that when respondent delivered his footlocker (Petitioner's Exhibit 2) to United Airlines for shipment to San Francisco he voluntarily entered into a bilateral contract with United Airlines. No finding was made to the contrary. Nor has respondent contended to the contrary. Therefore, from the airbill used by the airlines (e.g., Petitioner's Exhibits 3, 6), respondent entered into a contract which was subject to certain terms and conditions.

One of the terms or conditions of respondent's contract with United Airlines was that it was " . . . mutually agreed that the shipment described is accepted . . . subject to the governing classifications and tariffs. . . . Said classifications and tariffs are available for inspection by the parties hereto and are hereby incorporated into and made part of this contract. "6/ The same provisions apply in respondent's contract with Western Airlines.

It is equally clear--no finding having been made nor contention raised to the contrary--that the tariffs incorporated into respondent's contract with United Airlines and Western Airlines provide that "[a]ll shipments

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6/ See, "CONDITIONS OF CONTRACT," No. 2, as set forth on the reverse side of the original of the airbills, Petitioner's Exhibits 3 and 6.

are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection."7/

It is to be further noted that in filling out the contract between the parties, respondent, among other things, had to declare the value of the "clothing and books" which he stated to be the contents of the footlocker he gave to United Airlines for shipment (R. T., pp. 10-14), and the value of the "books and dishes" which he stated to be the contents of the footlocker he gave to Western Airlines for shipment (R. T., p. 105).

Respondent did not have to ship his footlocker via the airlines. Nor, apparently was he forced to ship the footlockers with any common carrier--he had an automobile. Thus, respondent was not forced or otherwise coerced into using a common carrier in order to transport his footlockers and their contents to San Francisco. Respondent elected to do so. He initiated the negotiations. And he was free to withdraw his offer before it was accepted.

If respondent wanted to keep the contents of his footlockers secret, he could have taken them to San Francisco by private automobile--or he could have planned to smuggle them to San Francisco by some means other than a common carrier which operates under governmental regulations. His decision to enter into a contract with United Airlines and with Western Airlines was his own voluntary act. Therefore, petitioner submits that respondent is bound by the terms of his contracts.

7/ See, Rule No. 24, C.A.B. No. 96.

If the airlines suspected that respondent's footlockers did not contain what he had stated they contained the airlines could have opened the footlockers to determine their contents for the purpose of assessing proper charges. (See Gold v. United States (9 Cir. 1967) 378 F.2d 588, 591.) And if by such an inspection it was found that there had been an undercharge because of respondent's fraudulent and deceitful misrepresentation of the footlocker's contents, petitioner assumes that respondent would not contend that he would not be liable for any additional charges which would be due.

By the same token, the evidence clearly shows that the airlines do not ship contraband. (R.T., pp. 122-123,) Respondent's footlockers, i.e., Petitioner's Exhibits 2 and t, did, in fact, contain contraband. Respondent told Dowling that Petitioner's Exhibits 2 and 5 contained clothing and books. (R.T., pp. 10-14.) Respondent told Case that Petitioner's Exhibit 5 contained books and dishes. (R.T., p. 105.) Respondent lied.

Respondent lied and he then urged that his footlockers (which he voluntarily placed in the hands of third persons under terms of a contract between him and the third persons) were entitled to the protection of the Fourth Amendment. Thus, respondent used the Fourth Amendment as a sword, not as a shield. Respondent used the Fourth Amendment to assist him in requiring third parties unwittingly to assist him in a nefarious, commercial enterprise. And he urged that because of the Fourth Amendment when these third parties discover the use which respondent had attempted to make of them, said third parties must have their eyes and lips forever sealed.

Petitioner respectfully submits that respondent

cannot use the Fourth Amendment in such a manner. (Cf., Walder v. United States (1954) 347 U.S. 62, 98 L. Ed. 503, 74 S. Ct. 354.) That is, since the airlines did nothing but exercise its contractual right because, as in United Airlines' instance, suspicion had been aroused as to the true contents of respondent's footlocker, United Airlines did only that which respondent had agreed could be done and, by so doing, United Airlines not only discovered that respondent had lied but, also, that he was committing a public offense.

Respondent waived his Fourth Amendment rights as to his footlockers-if any he had--under the terms and conditions of the contracts which he entered into with United and Western Airlines.

And, contrary to the majority opinion below, United Airlines had a legitimate business interest in determining whether respondent's footlocker contained marijuana. Dowling's suspicions (based on his experience, his knowledge, and the apparent circumstances) were reasonably aroused. He suspected that respondent's footlocker contained marijuana, not clothing and books. In petitioner's view, it is in the legitimate interest of a common carrier--or any other reputable business--not to want to assist in making contraband narcotics available to peddlers and users.

In any event, to what extent does the Fourth Amendment apply to footlockers which by contract have been delivered into the hands of a common carrier for shipment? It has no application. The Fourth Amendment does not, as such, protect footlockers; it protects persons. (Katz v. United States, supra, 389 U.S 347.) "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth

Amendment protection. [Citations.] . . . . " (Id., 389 U.S., at 351.)

In this case, respondent knowingly delivered into the possession of a common carrier a footlocker. As a condition of the contract with the common carrier, e.g., United Airlines, to ship said footlocker for him, respondent, among other things, agreed that the carrier could inspect the contents of the footlocker. As part of the contract, respondent publicly declared what the contents of the footlocker were, albeit he lied in this regard. A reasonable, honest person would not expect to have privacy as to the contents of a footlocker under these circumstances.

And petitioner respectfully submits that the man whose expectations of privacy are the test under Katz is not only a reasonable man but, also, an honest man. By entering into a voluntary, bilateral contract with the airlines respondent had to tell the airlines what was in the footlockers. He had to disclose their contents. If a reasonable man is assumed to be an honest man, i.e., that a reasonable man would not expect that he is entitled to lie in his business dealings and expect the Constitution to shield him from his lie, then, in petitioner's view, respondent's footlockers in this case were not within the protection of the Fourth Amendment.

Similarly, a reasonable man would expect to be held to the terms and conditions of a voluntary, bilateral contract. It is true that the right of the airlines to inspect is incorporated by reference on the back of the contract or "airbill" and that these terms and conditions

are printed in grey type.[8] But it is also true that this grey type is clearly legible. And, furthermore, it is equally clear that respondent in this case had contracted with the airlines to transport a large amount of marijuana.[9] And petitioner respectfully submits that the average, i.e., reasonable, business man who delivers goods worth $50,000.00 to a carrier will read--even the fine print--of any contract which he enters into.

Thus, in this case the question is not solely whether respondent consented to a search of his footlockers by either the airlines or the police. It is not whether respondent waived the protection which the Fourth Amendment afforded the contents of his footlockers. Such questions assume that the contents of respondent's footlockers were protected by the Fourth Amendment.

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[8] See, People v. McGrew, supra, 1 Cal.3d, n.3, p. 410.

[9] A conservative value of the marijuana on the illicit market would be $50,000.00. The gross weight of Petitioner's Exhibit 2 was 112 pounds; the gross weight of Petitioner's Exhibit 5 was 84 pounds; Petitioner's Exhibit 8 contained 18 kilos of marijuana, i.e., approximately 40 pounds. Thus there were 236 pounds less the weight of the footlockers, wrapping paper, etc. Assuming there was 225 pounds of marijuana and that 1,000 cigarettes can be made from a kilo of processed marijuana (see People v. Walters (1968) 264 Cal.App.2d 834, 70 Cal.Rptr. 766, 770) respondent was transporting enough marijuana to make over 100,000 cigarettes. At fifty cents a cigarette, this would be a retail price of $50,000.00

The question in this case--and the first reason why this Honorable Court should grant certiorari--is whether respondent had any Fourth Amendment protection in the first place.

As the dissent in the court below states:

> "In People v. Edwards (1969) 71 A.C. 1141, [80 Cal.Rptr. 633, 458 P.2d 713], this court indicated that in determining admissibility of evidence the significant criterion is the defendant's 'reasonable expectation of privacy' in maintaining actual or constructive possession of the objects at issue. While undoubtedly this defendant hoped to avoid detection in shiping contraband, I find it difficult to conclude that he had a reasonable expectation of privacy when he shipped a footlocker by an interstate carrier which had a right of inspection given to it by the administrative agency regulating the airline and its operations. This defendant declared to one carrier he was shipping 'clothing and books' and to the other he represented he was shipping 'books and dishes.' The rates charged for shipment were based on those representations, which were knowingly false. If, for any reason, an airlines employee doubted the shipments contained the objects indicated, he had an unquestioned right to open the containers for inspection. This right of the airline is not diluted by the fact that contraband was discovered--which could not be shipped at any rate--rather than some legal perishable commodity

> which could be shipped at a rate different from that prescribed for clothing, books and dishes." (Emphasis in original.) (1 Cal. 3d, 415.)

Yet the majority in the court below held that:

> ". . . The Fourth Amendment protection of 'effects' includes securely closed footlockers shipped through common carriers. Neither the language of the Fourth Amendment, nor of any of the cases interpreting the protection of that amendment, suggest that warrants apply to 'houses' but not to 'effects.' The exceptions to the requirements of a warrant are based on circumstances and not on categories of items. The requirement of a warrant, unless otherwise excused, applies to whatever is protected by the Fourth Amendment. (See Katz v. United United States, [supra, 389 U.S. 347].)" (Footnote omitted.) (1 Cal. 3d, 409-410.)

Therefore, petitioner respectfully submits that this Honorable Court should grant certiorari to answer the question as to whether respondent in this case so knowingly exposed to the public the contents of his footlockers that their contents were not the subject of Fourth Amendment protection. 10/

10/ See Katz v. United States, supra, 389 U.S. 347, 351.

3. The decision below creates a conflict with the decisions of the United States Court of Appeals for the Ninth Circuit as to the applicability of the Fourth Amendment under the facts of this case; under the federal decisions there would not have been a violation of the Fourth Amendment, whereas the majority of the court below found such a violation; are interstate carriers to conduct their business under the decisions of the several states, or under federal law? In this case the airlines would not be subject to a civil action under the federal decisions; are interstate airlines to be subjected to possible civil actions in the state courts for doing the same thing under the same law, namely, the Fourth Amendment?

In its opinion, the majority of the court below relied upon a decision of the United States Court of Appeals for the proposition that in this case there was a violation of the Fourth Amendment. The dissent below takes issue with the majority on this point and points up the conflict which the majority opinion creates with other decisions of the United States Court of Appeals.

Thus, the majority of the court below states:

> "The People argue in effect that any waiver of Fourth Amendment protection, for whatever limited purposes, results in a waiver for all purposes. This contention was rejected in Corngold v. United States, 367 F.2d 1, 7, also involving a search of

baggage shipped through an airlines freight service.

"Corngold relied on Stoner v. California (1964) 376 U.S. 483, 489 [11 L. Ed. 2d 856, 861, 84 S. Ct. 889], which rejected the contention that implied consent of access for any purpose results in consent for all purposes: 'It is true * * * that when a person engages a hotel room he undoubtedly gives "implied or express permission" to "such persons as maids, janitors or repairmen" to enter his room "in the performance of their duties." [[Citation.]] But the conduct of the night clerk and the police in the present case was of an entirely different order.'

"In Corngold v. United States, supra, 367 F. 2d 1, the court ruled that 'Appellant did not abandon his package; and mere surrender of custody to a carrier did not forfeit appellant's right to privacy. [[Citations.]] * * * Appellant's package, securely wrapped and tied, was delivered to the airline solely for transportation from Los Angeles to New York, and the inspection clause in TWA's tariff authorized examination only by the carrier itself.' (367 F. 2d at pp. 7-8.)

"Stoner and Corngold recognize that the scope of consent to an invasion of privacy depends upon the circumstances. Other cases involving implied limited consent to an invasion of privacy make clear the

significance of the circumstances. Thus, in United States v. Blok (D.C. Cir. 1951) 188 F.2d 1019, 1021, 88 App. D.C. 326, the police searched the desk of an employee; the court, in holding the search unlawful, stated: 'No doubt a search of [[the desk]] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use.' (See also, Cunningham v. Heinze (9th Cir. 1965) 352 F.2d 1, 5, cert. denied, 383 U.S. 968 [16 L.Ed.2d 309, 86 S.Ct. 1274], following Stoner. Compare searches properly within the implied consent to search in People v. Plane, 274 A.C.A. 1, 4 [78 Cal.Rptr. 528] [[landlord entered tenant's apartment to shut off lights and oven]]; In re Donaldson, 269 Cal.App.2d 509, 510 [75 Cal.Rptr. 220] [[search of student's locker by school vice principal]]; People v. Rightnour, 243 Cal.App.2d 663, 666 [52 Cal.Rptr. 654] [[maid entered guest's room to clean up]]; People v. Gonzales, 182 Cal.App.2d 276, 277-278 [5 Cal.Rptr. 920] [[search of knife-wounded victim by hospital personnel to determine identity]].)" (1 Cal.3d, 411-412.)

In response to this, the dissent below stated:

"The majority lean heavily on Corngold v. United States (9th Cir. 1966) 367 F.2d 1. In Corngold the transportation agent was initially contacted by government [illegible] directed him to a specific

package and asked him to open it. Our case is factually closer akin to a more recent Ninth Circuit decision which carefully circumscribes the Corngold rule: Gold v. United States (9th Cir. 1967) 378 F. 2d 588, in which at pages 590-591, the court held Corngold inapplicable to a situation in which the transportation personnel, with 'suspicions aroused * * * had no way to determine whether the contents were fit for carriage and properly classified except by opening them. This the carrier had the right to do under its tariffs.' Indeed, the instant case is stronger than Gold, for here there was no prior direct contact between law enforcement officers and the airline employee. Dowling opened the footlocker at the direction of his company supervisor, not upon police suggestion.

'It was not a law enforcement agency but Dowling who notified other airlines about the defendant and his shipment. Pursuant to that warning Western Airlines' employees Case and Sweeney observed the defendant's footlocker and called United to report. Fortuitously the police had then arrived at United and they proceeded from there to the Western offices. They noted the footlocker pointed out to them by the Western employees and could readily detect from it 'an odor of marijuana.' This justified the subsequent search and seizure. (See my dissent in People v. Marshall (1968) 69 Cal. 2d 51, 62 [69 Cal. Rptr. 585,

442 P. 2d 665].)

"As this court recently held in People v. Superior Court (1969) 70 Cal. 2d 123, 128 [74 Cal. Rptr. 294, 449 P. 2d 230]: 'The conduct of a person not acting under the authority of a state is not proscribed by the Fourth or Fourteenth Amendments of the federal Constitution. There are no state standards for "search and seizure" by a private citizen who is not acting as an agent of the state or other governmental unit. Therefore, acquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable. (People v. Randazzo (1963) 220 Cal App. 2d 768, 775-776 [34 Cal. Rptr. 65] [[citation]] cert. den., 377 U.S. 1000 [12 L. Ed. 2d 1050, 84 S. Ct. 1933] [[citations]], and a motion to suppress evidence so obtained cannot be made on the ground that its acquisition constitutes an unreasonable search and seizure under section 1538.5.'

"Since the airline employees had a legal right to inspect the footlockers, I can see no impediment to their advising the police of the presence of contraband and to the police taking possession of and making evidentiary use of the contraband displayed to them. Indeed, that was the precise situation in People v. Superior Court (1969) supra, 70 Cal. 2d 123, in which a private detective gave a copy of a tape recording to law enforcement officers. We properly declined to suppress the evidence prior to

> trial. To the same effect is Wolf Low v. United States (9th Cir. 1968) 391 F. 2d 61, 63, in which the court found proper the 'conduct of the airline in turning over to the Government the fruits of its search of the defendant's suitcases, and the conduct of the Government in making use of the information and evidence obtained by the airline's search * * *'" (1 Cal. 3d, 415-417.)

In petitioner's view, the majority below erroneously interpreted and erroneously applied Corngold to this case. Corngold is inapposite to this case.

Nowhere in the record is there evidence that the warning to be on the lookout for contraband came directly from any police department. Mr. Dowling (agent for United Airlines) stated, "I opened it up on my own with no instructions from anyone except the permission of the supervisor to do it." (R.T., p. 100.) Mr. Dowling, in response to a question posed by respondent stated: "I don't know where they [meaning his supervisors] received the word from. . . ." (R.T., p. 100.) Further, Mr. Dowling stated: "[I] don't know for sure who told our inspectors what. All I know is what the scuttlebutt said, that it came through from Honolulu. I don't know that for sure. It could have come from--they could have dug it up on their own. I don't know." (R.T., p. 58.)

The record shows that essentially we had this situation: We have a young air freight agent, Mr. Dowling, that has been so employed with United Airlines for several years prior to the date in question. (R.T., p. 8.) Mr. Dowling was schooled (R.T., p. 67) and

obviously well-read in regard to the tariffs which govern the day-to-day handling of air freight. (R.T., p. 23.) The lead agent of the United Airlines air freight office in San Diego told Mr. Dowling that he had received information from the United Airlines investigators in Los Angeles (R.T., p. 46), that people were shipping narcotics out of San Diego, and that they were coming out in footlockers, brand new ones. Also Mr. Dowling was given the approximate weights to look for, as footlockers filled with narcotics generally were overweight (R.T., p. 33). With that background enters respondent. Testimony shows that Mr. Dowling's suspicions were aroused by respondent's appearance (R.T., p. 14), nervous manner (R.T., p. 62), and the fact that the trunk was heavy (R.T., p. 65) for the type of material stated to be enclosed therein, i.e., clothes and books (R.T., p. 10). With Mr. Dowling's suspicions being reasonably aroused, to the extent of suspecting that the trunk contained marijuana (R.T., p. 39), he called his supervisor. After relating the situation to his supervisor, Mr. Dowling was given the "go ahead." (R.T., p. 36.) The locker was opened, notwithstanding the supervisor's authorization, because of Dowling's knowledge of tariff regulations that authorize an inspection of any shipment, and completely on his own without any thoughts as to police rights to do this sort of thing. (R.T., p. 41.)

After Dowling opened the footlocker with a hammer and nail, i.e., forcing the pins out of the hinges in the back (R.T., p. 39), he called his supervisor back and told him what he had found (R.T., p. 24) and at that time was told to contact the police (R.T., p. 37). Mr. Dowling had at the depot no specific person (R.T., p. 75) or number to call (R.T., pp. 37-38) so he was able only to contact the City Police Department general information number (R.T., p. 73) and they sent out an officer (R.

T., p. 25). The officer, Mr. Burgess, came alone (R. T., p. 77) and after identifying himself (R. T., p. 77), was briefed by Dowling for about five to ten minutes (R. T., p. 78a) out in front by the counter area (R. T., p. 78a) on what had taken place. (R. T., p. 78a.)

And after relating this to the police officer, either Dowling said "I have got it back here" (R. T., p. 78a) or the officer asked to see it (R. T., pp. 78a, 25-26); whatever the case, Officer Burgess followed Dowling back to where the chest had been placed and looked into the chest from behind Dowling when Dowling opened it for Burgess' inspection (R. T., p. 81).

The majority of the court below, under these facts, relied on the decision in Corngold v. United States (9 Cir. 1966) 367 F.2d 1. But it is to be noted that the majority opinion of the United States Court of Appeals in Corngold held that under the facts of that case the initial opening of the packages by the airlines was done at the direct request of a law enforcement agent and, therefore, the airline agent was a state agent.

The facts of Corngold are to be distinguished from the facts of this case. Indeed, in Gold v. United States, supra, 378 F.2d 588, the United States Court of Appeals itself distinguished away the Corngold holding. In Gold the court stated:

> "In Corngold government agents observed the defendant deliver packages to a Trans-World Airlines agent at the Los Angeles International Airport. When the defendant departed, the government agents informed the transportation agent that they

suspected that the packages contained smuggled watches and that they would like to inspect the shipment. They also pointed out that the shipper had incorrectly filled out the airway bill. The transportation agent testified that the government agents asked him to open the package. The employee initially opened one package while the government agents looked on, and then the agents completed opening the package. They found a number of small boxes inside the large package and removed and opened them. They found contraband watches and marked the small boxes for future identification.

"On this evidence the court sitting en banc concluded that the search was in substance a search by the federal agents. It found that the airline employee had participated in the search solely to serve the purposes of the government and that the carrier had taken no action on its own behalf when the mislabeling was revealed. The search was without a warrant and the court, finding no circumstances justifying a search without a warrant, reversed the defendant's conviction.

"The instant case differs from Corngold in several significant respects. After informing the manager of their suspicions regarding the shipment, the government agents left the premises. The manager, after attending to some other business,

made the decision to investigate further. The shipment was taken from the freight area to the air freight room at the manager's direction. No one else was present while the manager and one other employee opened one of the packages. After finding the film and observing its nature, the manager determined that the matter 'should be someone else's business.' It was another 45 minutes to an hour after discovering the films before he got around to calling the government agents.

"We conclude that the initial search of the packages by the airline's employee was not a federal search, but was an independent investigation by the carrier for its own purposes. Unlike Corngold, here the agents did not request that the packages be opened, and they were not present when it was opened. The agents had the same right as any citizen to point out what they suspected to be a mislabeled shipping document, and they exercised no control over what followed. What did follow was the discretionary action of the airline's manager and was not so connected with government participation or influence as to be fairly characterized, as was the search in Corngold, as 'a federal search cast in the form of a carrier inspection.'

"While it might be expected that the carrier would not ignore the packages after being advised of the mislabeling by government agents who obviously had more

> than a citizen's interest in the shipment, the carrier had sufficient reasons of its own for pursuing the investigation. The manager testified that packages suspected of containing something other than what was described on the air waybill were sometimes opened so that the airline would know what was being carried on its airplanes, and so that it could assess proper charges. Despite the manager's inquiry, the government agents did not reveal what they suspected the true contents of the packages to be. His suspicions aroused, the manager had no way to determine whether the contents of the packages were fit for carriage and properly classified except by opening them. This the carrier had the right to do under its tariffs.
>
> "These same independent interests of the airline were relied upon by the government in Corngold to support the position that the search was nothing more than a carrier inspection carried out pursuant to the inspection clause of the airline's tariff. Here the facts support that theory. In Corngold they did not. The court below was correct in denying appellant's motion to suppress the films." (Emphasis added.) (378 F.2d, 590-591.)

Thus, in this case, all law enforcement did was to alert United Airlines to salient facts. Indeed, there was not even the direct communication between law enforcement and the airlines in this case as there was in Gold.

That the majority below erred by holding Corngold applicable in this case is also made clear by three other decisions of the United States Court of Appeals for the Ninth Circuit--all of which were before the court below. 11/

The first case, Wolf Low v. United States (9 Cir. 1968) 391 F. 2d 61, cert. denied, 4 Cr. L. 4038, is discussed in the above quoted portion of the dissent in the court below.

11/ Corngold v. United States, supra, 367 F. 2d 1, was decided by the United States Court of Appeals for the Ninth Circuit sitting en banc. Gold v. United States, supra, 378 F. 2d 588, was decided after Corngold. If it assumed that the two decisions were irreconcilable it could be urged that Gold overruled Corngold. Thus, Corngold was decided by a majority of the court in an opinion written by Circuit Judge Browning in which Circuit Judges Hamley, Jertberg, Merrill, Koelsch and Ely concurred (i.e., a total of six circuit judges); two dissenting opinion were filed, one by Circuit Judge Barnes, in which Chief Circuit Judge Chambers concurred and the second in which Circuit Judge Duniway dissented separately and concurred in part in the dissent of Circuit Judge Barnes (i.e., a total of three circuit judges dissented). Gold was decided by a unanimous panel of three circuit judges, two of whom were among the majority in Corngold; thus, the decision in Gold was written by Circuit Judge Madden and concurred in by Circuit Judges Jertberg and Browning (who wrote for the majority in Corngold). Therefore if one subtracts the two circuit judges who decided Gold from the majority in Corngold (i.e., 6 minus 2 equals 4) and

(Continued on next page.)

The second case is United States v. Spencer (9 Cir. 1969) _____ F. 2d _____ (No. 22,623-A, decided June 22, 1969). In Spencer the court held in circumstances more persuasive than present in this case that the opening of a footlocker by an airline employee pursuant to the Civil Aeronautics Board inspection rule, supra, was not proscribed by the Fourth Amendment. Corngold was held by the court to be inapposite.

Similarly, in the third case, Clayton v. United States (9 Cir. 1969) 413 F. 2d 297, the court upheld an airline search of an air express shipment on the ground that the initial discovery of the heroin was the result of a private search and that the subsequent acts of the police were justified because of the exigencies of the case. Corngold was inapposite.

Thus, it is clear that if this case had been reviewed by the United States Court of Appeals for the Ninth Circuit a violation of the Fourth Amendment would not have been found. Yet the majority of the court below, relying on a decision of the United States Court of Appeals for the Ninth Circuit, held that there was a violation of the Fourth Amendment.

The two results would be different despite the fact

(Continued from preceding page.)

adds these two circuit judges to the dissenters in Corngold (i.e., 3 plus 2 equals 5) the vote in Corngold becomes 5 to 4. Then adding Circuit Judge Madden's position in Gold, Gold on this basis overrules Corngold.

that the airlines' agents performed the same acts and were purportedly controlled by the very same law, namely, the Fourth Amendment.

This, in petitioner's view, is an intolerable situation. Interstate airlines operate in the several states. Is their conduct to be lawful in one jurisdiction and unlawful in another when the same law is supposed to govern? Are interstate carriers to be left to defend themselves against civil actions in the several states for alleged violations of privacy or constitutional rights, when under federal decisions there were no such violations?

In California, lower courts are bound to follow the decisions of courts of superior jurisdiction, whether these decisions are right or wrong. (See Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 369 P. 2d 937.) But California courts are not bound by the decisions of lower federal courts. (See People v. Willard (1965) 238 Cal. App. 2d 292, 305, 47 Cal. Rptr. 734.) Thus, as the law of California now stands under the majority opinion of the California Supreme Court in this case, a lower court in California would on the facts of this case be bound to find that respondent's Fourth Amendment rights had been violated, even though the United States Court of Appeals for the Ninth Circuit on the same facts would not find such a violation.

In petitioner's view, this Honorable Court should grant certiorari to resolve the conflict and to provide a uniform answer to all federal and state courts as well as all interstate airlines. Similarly, whether this Honorable Court's decision in Stoner v. California (1964) 376 U.S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889, is

controlling in cases such as this should be resolved; if it is, then the decisions of the United States Court of Appeals for the Ninth Circuit in Gold, Wolf Low, Spencer and Clayton should be reviewed since, implicitly, these decisions are authority for the proposition that Stoner is not controlling.

4. The decision below implicitly held that one of the rules and regulations of the Civil Aeronautics Board is violative of the Fourth Amendment to the Constitution of the United States.

Whether Rule and Regulation Number 96, Rule 24 of the Civil Aeronautics Board (which reads "INSPECTION OF SHIPMENTS All shipments are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection.") be viewed as private law, e.g., contractual rights created by parties to a contract, or public law, e.g., governmental regulations or statutes. Cooper v. California (1967) 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788, teaches that searches of air freight by airlines is reasonable under the Fourth Amendment.

In Cooper this Honorable Court stated that searches authorized by law can be, though they are not per se, reasonable under the Fourth Amendment. In this case, inspection of respondent's footlockers was authorized by law--public or private. And whether respondent under the circumstances of this case had actual knowledge of this law is, in petitioner's view, just as irrelevant as was whether the defendant in Cooper had actual knowledge of the law which under the circumstances of his case permitted the search of his automobile. The relevant point in Cooper and in this case is that the laws which

authorized the respective searches were reasonable.

Without reiterating all of the reasons given in this petition by petitioner under the first reason why certiorari should be granted, the rule of the Civil Aeronautics Board above cited is reasonable. An interstate airline should have the right to inspect containers which it is asked to ship on airliners. This is especially so when the carrier rightfully requires a declaration or description of what it is that is being offered for shipment and when what is being shipped has a direct bearing on the rates which will be charged if the goods are accepted for shipment by the carrier.

Any business enterprise should be able to protect itself against fraud.

Any business enterprise should be able to protect itself from taking into its possession that which is illegal for any person to possess. If a person has no right to possess something, e.g., narcotics, surely that person has no right to make a business enterprise ship it.

And for the reasons given earlier in this petition a commercial, interstate passenger airlines should have the right to protect itself and its customers from dangers which are common to all airlines.

The Civil Aeronautics Board rule at issue in this case gives airlines under the jurisdiction of the Board the right to protect themselves. This, in petitioner's view is reasonable--under the Fourth Amendment or any other test.

That the majority of the court below implicitly

rules that the Civil Aeronautics Board rule here under review is violative of the Fourth Amendment is pointed up in the dissent below, which states:

> "To deny the airline through its employees a right of inspection when they doubt, for any reason, that a package contains the objects represented by the shipper to be therein, results in compelling the airline, an innocent third party, to blind itself to reality and thus to assist the [respondent] in his illicit commercial enterprise of transporting marijuana. This is the unfortunate result of the majority opinion." (1 Cal. 3d, 415.)

Thus, this Honorable Court should grant certiorari to determine whether airlines operating under a federal regulatory agency can exercise the rights given to them by that agency or whether, as is implicit in the majority opinion of the court below, the particular rule or regulations at issue in this case is violative of the Fourth Amendment. This question needs to be answered by this Honorable Court, otherwise interstate airlines must operate under a rule of regulatory agencies which rule can be interpreted differently by the federal courts as well as the courts of the several states.

5. The decision below, as pointed up by the dissent, may result in an airline's agent (operating under the rules of the Civil Aeronautics Board and the terms and conditions of a voluntary, bilateral contract between the airline and a consignor) who by his independent conduct determines that the con-

> signed freight is contraband, being arrested for a felony offense under the law of the State of California in order to protect the consignor's Fourth Amendment rights--even though said consignor has no right to possess the contraband and the contraband was given into the possession of the airline's agent under the circumstances set forth under the first question presented in this petition.

The effect of the majority opinion in the court below is that when an airline's agent opens a freight container under circumstances such as those in this case and obtains cause to believe the container contains kilos of marijuana; closes the container, calls and informs the police of the facts, when the police arrive again relates the facts to the police and takes the police to and identifies the container in question, the airline's agent must demand that the police produce a search warrant before permitting the police to look into the container and to seize the marijuana therein.

As the dissenting opinion in the court below states:

> "Section 11531 of the Health and Safety Code makes it a felony for any person to transport marijuana. The section applies not only to one who arranges shipment, as the defendant here, but it would also apply to any airline employee who knowingly transports marijuana. Thus if an airline employee reasonably believes a shipment contains a substance the transportation of which is illegal, he has the right and perhaps a duty to inspect the package or container. The purpose of such inspection is

not to act as an agent of the police, but to insulate himself from any criminal culpability." (1 Cal. 3d, 414.)

And the dissent in the court below points up a very real problem when it states that an airline's agent under the circumstances of this case has an interest in insulating himself from criminal culpability.

Under the procedure which the majority of the court below requires, an airline's agent in a case such as this one, must place himself in a position where the police could lawfully arrest the airline's agent, e.g., for possession of marijuana in violation of Section 11530 of the California Health and Safety Code, a felony.

The elements of unlawful possession of marijuana under California law are (1) dominion and control (2) knowledge of its presence and (3) knowledge of its narcotic nature. (People v. Layne (1965) 235 Cal. App. 2d 188, 193, 45 Cal. Rptr 110.)

The police must have reasonable cause to make an arrest without a warrant. But reasonable cause means such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person to be arrested is guilty of a crime. (People v. Lindogan (1963) 212 Cal. App. 2d 466, 27 Cal. Rptr. 905.) And the experience of an officer may be considered in determining whether he has reasonable cause to arrest. (People v. Sullivan (1966) 242 Cal. App. 2d 767, 51 Cal. Rptr. 778.)

Therefore, under facts such as those in this case, since the airline's employee was a reliable person

(People v. Barcenas (1967) 251 Cal.App. 2d 405, 59 Cal. Rptr. 419) and also, in net effect, told the police what there was in his possession (cf., People v. Smith (1969) 268 Cal.App. 2d 754, 74 Cal. Rptr 379) the police, from all of that which the airline's agent had told the police, had reasonable cause to believe that respondent's footlockers contained marijuana (see, People v. Anderson (1968) 266 Cal.App. 2d 125, 71 Cal. Rptr. 827, and People v. Barcenas, supra, 251 Cal.App. 2d 405), the police had reasonable cause to believe the airline's agent knew the footlocker contained marijuana, that the airline's agent knew the narcotic nature of marijuana and--if the airline's agent were to demand that the police produce a search warrant before he would permit the police to search the footlocker--that the airline's agent had dominion and control (exclusively or jointly as a principal or agent) over the marijuana in the footlocker. Therefore, in such a case, the police would have reasonable cause to arrest the airline's agent for possession of marijuana.

Having made a valid arrest, especially under the law applicable at the time (i.e., prior to June 23, 1969), the police under the procedure required by the majority of the court below could have made an equally valid search of respondent's footlockers in this case. Such an arrest and search, in petitioner's view, could today be performed, assuming the airline's agent was standing next to the container of marijuana at the time of his arrest.

Moreover, this result clearly distinguishes cases such as this one from a case such as People v. Marshall, supra, 69 Cal. 2d 51, cited by the majority of the court below. In Marshall the majority of the California Supreme Court concedes that if the defendant had been

present in the apartment at the time the police entered, a search of the opaque bag under the law which was then applicable would have been lawful as an incident to a valid arrest. (See People v. Marshall, supra, 69 Cal. 2d, at 61.)

In petitioner's view, it is unreasonable and contrary to logic--especially to the logic of a lay businessman who is conducting a legitimate enterprise-- to place a person such as an airline's agent in a position where he could be arrested because the Fourth Amendment protects a shipper's privacy as to the contents of a container of putative freight which has been given into the possession of the airline's agent under the circumstances set forth under the first question presented in this petition.

As mentioned earlier in this petition, under the majority opinion in the court below, respondent was and is permitted to use the Fourth Amendment as a sword. Under the procedure which is required by the majority opinion in the court below respondent is allowed to wield his Fourth Amendment sword in such a manner as to strike and injure third persons who want no part in respondent's criminal acts and who want to assist in suppressing criminal acts of persons such as respondent.

In petitioner's view, this Honorable Court should grant certiorari in this case to determine whether citizens who in the course of exercising legal rights--given by a federal agency and a voluntary, bilateral contract--must place themselves in a position where they could be criminally culpable as the price for "getting involved" and in assisting in the suppression of crime.

6. The majority opinion in the court below implicitly held that a person's effects have more protection under the Fourth Amendment in the circumstances of this case than those same effects would have had if they had been in respondent's automobile; that such is the implicit holding of the majority in the court below is clear since the Court of Appeal of the State of California expressly ruled that respondent's footlockers in this case were not entitled to Fourth Amendment protection under the decisions of this Honorable Court which hold that a police officer may search a vehicle without a warrant, without consent and not as an incident to an arrest if the officer has reasonable cause to believe that the vehicle contains contraband.

The starting point in any search and seizure case is whether, under the facts and circumstances presented, the search or seizure was reasonable. Cooper v. California (1967) 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788.

And the object or subject of the search must be considered. That is, automobiles, for instance, are not entitled to the same protection as homes because an automobile is mobile. Therefore, the police may search an automobile without consent, without a warrant and without the search being incident to an arrest if there is probable cause to believe that the automobile contains contraband, the instrumentality of a crime, or evidence relating to a specific crime. (Dyke v. Taylor Implement Mfg. Co. (1968) 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472; People v. Madero (1968) 264 Cal. App. 2d 107, 111, 70 Cal. Rptr. 159; People v. Morrison (1968) 258 Cal.

App. 2d 75, 65 Cal. Rptr. 445, 449.)

Also the exigencies of the circumstances must be considered. Thus, when a person or object is about to leave the jurisdiction by air, it is a factor to be considered. (See, People v. Crovedi (1967) 253 Cal. App. 2d 739, 61 Cal. Rptr. 349; People v. Lurie (1967) 257 Cal. App. 2d 98, 64 Cal. Rptr. 637.12/

In the case at bar, either Officer Burgess or Agent McLaughlin, or both, had probable cause to believe that Petitioner's Exhibit 2 contained marijuana after Dowling explained what had gone to pass prior to Burgess' arrival--which includes Dowling's observations of the inside of Petitioner's Exhibit 2 as well as the circumstances surrounding its acceptance by him and the exhibit's outward appearance. (Cf., People v. Barcenas, supra, (1967) 251 Cal. App. 2d 405.)

And since the police may search an automobile without a warrant, without consent, and not as an incident to an arrest if the police have probable cause to believe the automobile contains contraband, a fortiori, the police should have authority to do the same with luggage, etc., under the circumstances of this case. That is, since respondent's footlockers were placed in the hands of a common carrier, since he was required to disclose the contents of the footlockers as part of the contract for shipment of same, since a condition of the contract granted the airlines the right to inspect the

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12/ That the exigencies are to be considered was acknowledged by the California Supreme Court in People v. Marshall (1968) 69 Cal. 2d 51, 69 Cal. Rptr. 585, 442 P. 2d 665.

footlockers, since respondent elected to place his footlockers and their contents into the stream of transportation via a common carrier, since without prompt action the footlockers would soon be shipped and thereby easily lost to any surveillance, certainly such footlockers should not be entitled to more protection than is afforded by the Fourth Amendment to an automobile.

Since respondent was using footlockers to further his nefarious commercial activity, petitioner submits that such footlockers lost the character--if any they had --of private baggage just as a house used for illegal commercial activities loses the character of a private residence. (Cf., Lewis v. United States (1966) 385 U.S. 206, 17 L. Ed. 2d 312, 87 S. Ct. 424. 13/

Therefore, petitioner respectfully submits that assuming the Fourth Amendment gave the footlockers in question some degree of protection, the searches of said footlockers by the law enforcement agents under the circumstances of this case was nonetheless reasonable.

In this case the Court of Appeal for the State of California specifically answered this question. The Court of Appeal held that under the decisions of this Honorable Court as followed by the courts of California, respondent's footlockers were not entitled to Fourth

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13/ Whether the officers involved had sufficient time to obtain a search warrant is irrelevant. That is not the test. Cooper v. California, supra, 386 U.S. 58. Assuming the police had three hours within which to obtain a search warrant, petitioner disagrees that on a Sunday evening in June such was sufficient time to obtain a search warrant.

Amendment protection after the police lawfully obtained probable cause to believe they contained contraband. Thus, the Court of Appeal stated:

> "When Dowling, based upon his previous experience, recognized marijuana in the footlocker, his report to the police gave them probable cause to believe the footlocker contained contraband. Where the police have probable cause to believe an automobile contains marijuana they may make a warrantless search of it not incident to arrest. [Emphasis in the original.] (Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 [88 S.Ct. 1472]; Carroll v. United States, 267 U.S. 132, 149 [45 S.Ct. 280, 283-284]; People v. Madero, 264 A.C.A. 126, 129.) The rule has its basis in the mobility of motor vehicles. In Carroll v. United States, supra, the rule was formulated, in part, upon an analogy to goods in the course of transportation, which Congress has historically treated differently with regard to search authorization than it has goods in a fixed dwelling or other building. (Carroll v. United States, supra, 267 U.S. 132 at pp. 150-153 [45 S.Ct. at pp. 284-285].)
>
> "Here McGrew had placed the two footlockers and the suitcase in the course of transportation. One of two things was bound to happen unless the police seized them. Either they would be shipped out of the jurisdiction to San Francisco or the

owner might return and remove the shipments from transit.

"It is our opinion the rule allowing a warrantless search of motor vehicles, not incident to an arrest, where the police have probable cause to believe contraband is present, applies with equal reason to goods in the course of transportation. Support for this view is found in Hernandez v. United States, 353 F. 2d 624.

"Having probable cause to search the footlocker at United Air Lines the police had equal cause to search the footlocker at Western Airlines. It was shipped by a person matching the description of the United shipper, who gave the same name and told the same travel plans." (75 Cal. Rptr. 381; see Appendix B to this petition.)

In petitioner's view, the Court of Appeal of the State of California correctly decided this question which was placed before the California appellate courts in this case. Yet by granting a hearing in this case the California Supreme Court vacated the opinion rendered by the Court of Appeal in this case. And though the California Supreme Court did not specifically reject the rule announced by the Court of Appeal on this question, such a rejection is implicit.

Petitioner, therefore, believes this Honorable Court should grant certiorari in this case to determine whether under the circumstances of this case (i.e., as set forth under the first question presented in this

petition) respondent's footlockers could or could not be searched by the police after the police had lawfully obtained probable cause to believe the footlockers contained contraband--just as a person's automobile which does not travel at nearly the speed of goods placed in the course of air transportation may be searched without a warrant, without consent and not as an incident to an arrest if the police have probable cause to believe the automobile contains contraband. Under the decisions of this Honorable Court, as followed by the California courts, if respondent in this case had returned to the airport and took his footlockers back from the airlines before the police had arrived and had put them in his car, then left his car for one reason or another, petitioner submits that knowing what they did the police could have searched respondent's car and, upon finding the footlockers, could have looked into them and could have seized the contraband therein. If there is a distinction between what could have been done by the police had the footlockers been removed to respondent's car and what was actually done in this case, petitioner respectfully submits that this Honorable Court should make the distinction.

7. The majority of the court below held that under the circumstances of this case respondent had not waived by his contracts any protection which the Fourth Amendment gave his effects in his footlockers; this holding was based on federal decisions, but it fails to acknowledge this Honorable Court's decisions in Katz v. United States, supra, 389 U.S. 347, and Zap v. United States, supra, 328 U.S. 624, which are authority contrary to the holding of the majority of the court below.

The majority of the court below stated that "[t]he People argue in effect that any waiver of the Fourth Amendment protection, for any limited purpose, results in a waiver for all purposes . . . " (1 Cal. 3d, 411.) The majority then cite Corngold v. United States, supra, 367 F. 2d 1, as authority that such a contention has been rejected by the federal courts. Further, the majority in the court below stated that the United States Court of Appeal for the Ninth Circuit in Corngold relied upon this Honorable Court's decision in Stoner v. California, supra, 376 U.S. 483.

Petitioner's contention was not and is not that any waiver of Fourth Amendment protection is a waiver for all purposes. Petitioner's precise position was and is that under the circumstances of this case (as set forth under the first question presented in this petition) respondent had not Fourth Amendment protection as to the effects contained in his footlockers; secondly, that the search was authorized by law, which law was and is reasonable under the Fourth Amendment; thirdly, if respondent had Fourth Amendment protection as to the contents of his footlockers, by analogy to vehicles, once the police had probable cause to believe the footlockers contained contraband such footlockers could be searched by the police; and, finally, whatever--if any--protection respondent had as to the contents of his footlockers under the Fourth Amendment, he waived such protection under the terms and conditions of the contract into which he entered with the airlines.

That Corngold v. United States, supra, 367 F. 2d 1, and Stoner v. California, supra, 376 U.S. 483, are inapposite to this case has been made clear under the second question presented in this petition.

Furthermore, the majority of the court below does not explain why the decisions of this Honorable Court in Katz v. United States, supra, 389 U.S. 347, and Zap v. United States, supra, 328 U.S. 624, are not controlling.

The majority in the court below would, however, be exactly right if it had stated that petitioner has and does contend that respondent in this case did by his contracts with the airlines waive any Fourth Amendment protection as to the contents of his footlockers. This position is predicated upon this case in the sense that all facts and circumstances, i.e., the cumulative circumstances, lead to such a conclusion. And, on this point, petitioner, in the court below as well as in this Honorable Court, relies upon the decisions of this Honorable Court in Katz v. United States, supra, 389 U.S. 347, and Zap v. United States, supra, 328 U.S. 624.

In the opinion of this Honorable Court in Katz, the twenty-second footnote reads, in part, as follows: "A search to which an individual consents meets Fourth Amendment requirements . . . " (389 U.S. 358.) As authority for this statement, the decision of this Honorable Court in Zap v. United States, supra, 328 U.S. 624, is cited.

The opinion of this Honorable Court in Zap reads, in part, as follows:

> ". . . [T]he law of searches and seizures as related in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But these rights may be waived. And when petitioner, in order to obtain the Govern-

> ment's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts . . . [328 U.S. 628.]
>
> "* * * * *
>
> ". . . Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts . . . " (Emphasis added.) (328 U.S. 630.)

Mr. Justice Frankfurter, with whom Mr. Justice Murphy and Mr. Justice Rutledge concurred, dissented from the opinion of this Honorable Court in Zap. However, Mr. Justice Frankfurter dissented only from the lawfulness of the actual seizure of the incriminating evidence in this case, since the search warrant under which it was taken was defective. Mr. Justice Frankfurter agreed ". . . that the Government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records . . . Accordingly, the search was legal and the inspectors could testify to what they gleaned from the inspection . . . " (Emphasis added.) (328 U.S. 632.)

It is to be noted that in Zap, federal statutes required as a condition of a defense contract that the contractor give consent to an inspection of its books, etc. Zap held such a condition to be valid. And the condition was held to be a valid waiver of Fourth Amendment protection. Thus, Zap invoked a voluntary, bilateral contract; if the petitioner in Zap did not like the conditions offered by the government (just as if respondent in this case did not like the conditions offered by the airlines), he was free to take his business elsewhere. But having entered into the contract, he was held to its terms--even in a criminal action.

It is, of course, true that in Zap the waiver of Fourth Amendment protection was set forth as an express condition in the contract; in this case the inspection clause was incorporated into respondent's contracts by reference. But petitioner respectfully submits that this difference is not a controlling distinction in this case.

It is not a controlling distinction in this case because respondent was not merely bringing personal baggage to an airport to check with the airlines as an incident to respondent's travels, as would the average traveler, student or serviceman. To the contrary, respondent entered into contracts with a common, interstate carrier to ship freight. And the freight respondent sought to have shipped was of substantial value, i.e., as stated earlier, $50,000.00. A person who ships property worth $50,000.00 is, in petitioner's view, one who should reasonably be held to a standard of care in his business affairs that would require him to investigate all aspects of his contracts for the shipment of such property. The capital investment, in common business logic, dictates that a reasonable man would take

care to understand all of the conditions and details of his contracts to ship valuable property.

Therefore, petitioner believes this Honorable Court should grant certiorari to resolve the conflict created by the majority of the court below between the Unites States Court of Appeals in Corngold v. United States and this Honorable Court's decision in Stoner v. California on the one hand, and this Honorable Court's decisions in Katz v. United States and Zap v. United States on the other hand, when such decisions are to be applied in cases such as this one.

8. The majority decision of the court below holds while a seizure of respondent's footlocker by the airlines for the police would be reasonable within the meaning of the Fourth Amendment, a search of said footlockers, i.e., looking into them, by the police under the total circumstances of this case was unreasonable within the meaning of said Fourth Amendment.

The majority opinion of the court below, in part, states:

> "None of the exceptions apply to the United or Western Airlines searches of the footlockers. When the footlocker checked with United Airlines was searched by the police, McGrew 'was neither present nor arrested until several hours after the search.' (People v. Marshall, supra, 69 Cal. 2d 51, 61.) His whereabouts were similarly unknown when the footlocker checked with Western Airlines was searched. Nor was there any likelihood

> that the lockers would be removed or the contraband destroyed; both footlockers were safely in the custody of the airlines. Both footlockers had been shipped on a 'space available' basis, so that the airlines were not even under a contractual obligation to ship the footlockers before a warrant could be obtained." (1 Cal. 3d 410.)

Thus, the majority of the court below direct that in a case such as this the airlines, after its agents have opened freight containers, which reveal contraband and have so informed the police, should, in effect, seize such freight containers and hold them until such time as the police arrive with a warrant, authorizing their search and seizure.

The majority below states that since respondent's footlockers were being shipped on a space available basis, the airlines were under no contractual obligation or duty to put the footlockers on the first space available. Petitioner submits that such would not have been and is not the understanding of parties to a contract such as is present in this case. That is, the parties would have understood that the airlines would ship air freight on the first space available, not on whatever space was available which the airlines decided to use at some future date.14/

14/ The opinion of the Court of Appeal of the State of California points up the actual exigencies in this case: "Here McGrew had placed two footlockers and the suitcase in the course of transportation. One of two things

(Continued on following page)

Further the majority of the court below expressly states that the footlockers were "safely in the custody" of the airlines. If the airlines were the custodians of respondent's footlockers with the right to inspect the contents thereof, 15/ and if the airlines could, as the majority of the court below apparently holds, seize the footlockers and hold them for the police:

(1) Why could the airlines not give a valid consent to the police authorizing the police to search, i.e., look into, the footlocker,

(2) Why did the police not have a good faith basis to believe that the airlines had apparent authority to give such a consent,

(3) And what makes a search of the footlockers by the police without a warrant unreasonable under the Fourth Amendment while a seizure of the footlockers for the police by the airlines is not unreasonable under said Fourth Amendment?

(Continued from preceding page.)

was bound to happen unless the police seized them. Either they would be shipped out of the jurisdiction to San Francisco or the owner might return and remove the shipments from transit." (75 Cal. Rptr. 381; see Appendix B to this petition.)

15/ Which right, however, the majority of the court below held was limited to an inspection ". . . for the airlines' own purposes." (1 Cal. 3d 413.)

The Fourth Amendment protects persons against unreasonable searches or seizures.

Petitioner respectfully submits that under the procedure which the majority of the court below requires in this case, a reasonable seizure under the Fourth Amendment is converted into an unreasonable search under the Fourth Amendment for no reasonable reason.

Therefore, petitioner believes that this Honorable Court should grant certiorari in this case to answer the important question of what is a reasonable seizure, as distinguished from what is a reasonable search, under the Fourth Amendment.

CONCLUSION

Since the Constitution does not guarantee to a possessor of contraband that his acts will not be discovered so long as he is in his residence but only that his residence will not be subjected to an unreasonable search or seizure (People v. Lawson (1969) 1 Cal. App. 3d 729, 81 Cal. Rptr. 883), petitioner respectfully submits that the same Constitution does not guarantee to a shipper of contraband in a case such as this that his acts will not be discovered but only that his effects will not be subjected to an unreasonable search or seizure.

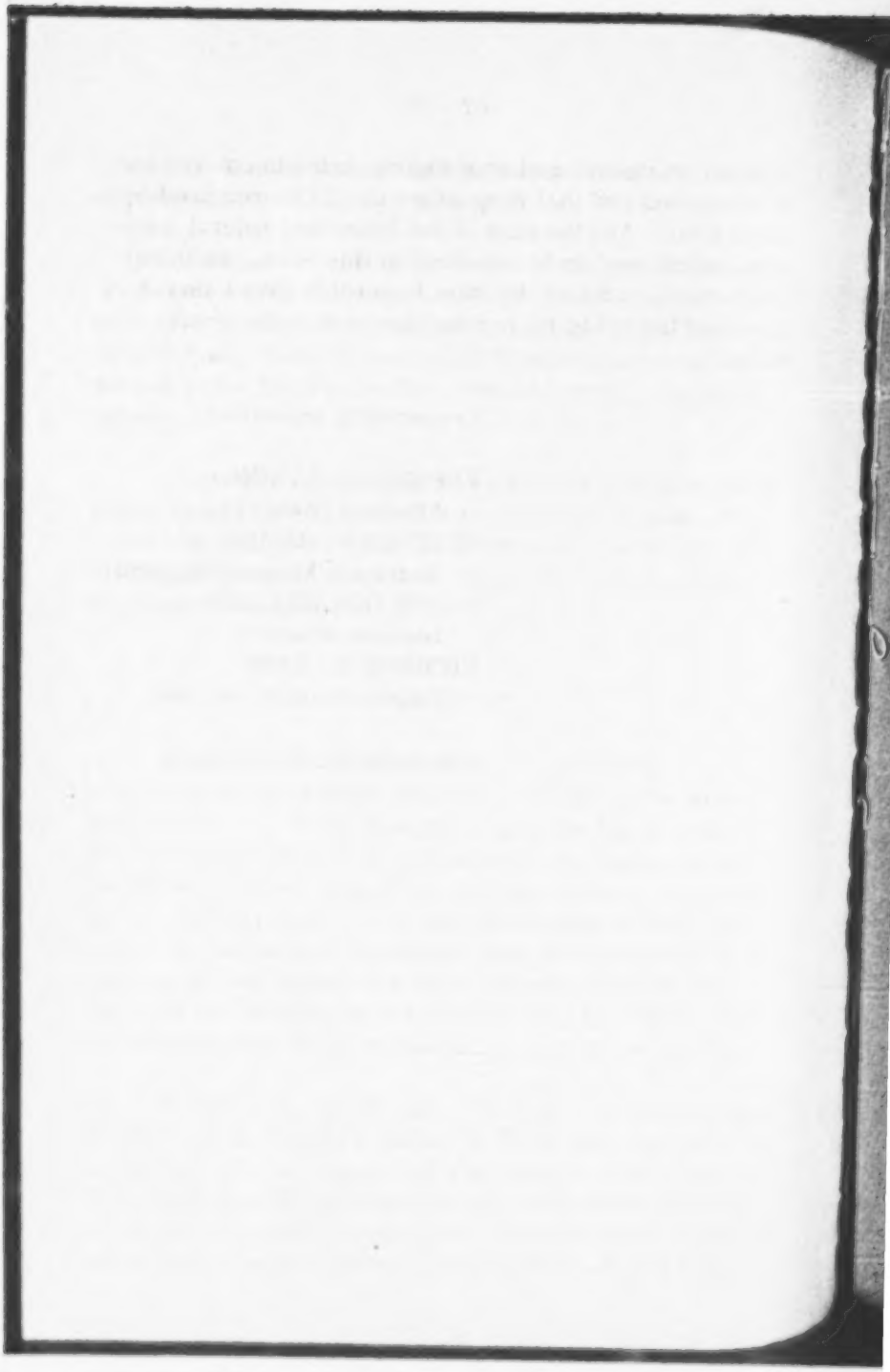
In this case, petitioner, for each separate reason and more importantly because of their combined and cumulative effect, respectfully submits to this Honorable Court that the searches in this case were not violative of the Fourth Amendment, that the suppression of the evidence on the ground that the evidence had been

obtained in violation of said Fourth Amendment was and is erroneous and that respondent should be required to stand trial. And because of the important federal questions which need to be resolved in this case, petitioner respectfully submits that this Honorable Court should grant certiorari to review the decision of the court below.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General
WILLIAM E. JAMES,
Assistant Attorney General
JAMES DON KELLER
District Attorney
RICHARD H. BEIN
Deputy District Attorney

Attorneys for Petitioner.



APPENDIX "A"

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Respondent, v. Kenneth T. McGrew, Defendant and Respondent, Crim. 13413

Filed: December 17, 1969

The People appeal from an order of the San Diego Superior Court dismissing felony charges against defendant Kenneth T. McGrew.

McGrew was charged by indictment with transporting marijuana (Health & Saf. Code, § 11531) and with possession of marijuana for sale (Health & Saf. Code, § 11530.5). After pleading not guilty to both charges and waiving jury trial, McGrew moved the trial court to suppress all evidence of the charged offenses (under Pen. Code, § 1538.5) and to dismiss the indictment (under Pen. Code, § 1385). Both motions were granted. The People have appealed.

McGrew brought a new, securely locked footlocker to the United Airlines freight service at the San Diego airport in the afternoon of June 25, 1967, to be shipped to San Francisco. The freight agent, one Dowling, observed that McGrew was wearing walking shorts and a T-shirt and had "quite long" hair. Dowling's supervisor had told him "to be on the alert for footlockers and suspicious people, and so on, that they

had been shipping marijuana, . . . " to check out any suspected contraband, to "See what is in there, and if it is marijuana . . . call the police." Dowling was suspicious, because of McGrew's "general appearance," and because the locker, which McGrew declared contained books and clothes, had an "exceptional weight" of 112 pounds, although Dowling admitted that the weight was consistent with a shipment of two-thirds clothes and one-third books.

After McGrew paid for the shipment and left, Dowling called his supervisor, who told him to open up the footlocker to see what it contained. Using a nail and hammer to knock out the hinge pins, Dowling opened up the locker "a couple of inches," just "enough to see what was in there." He observed several bricks or small packages, wrapped in brown paper or newspaper. He could not see the contents of the packages and he did not open any of them. He closed the lid of the footlocker and after calling his supervisor again, called the police.

San Diego Police Officer Burgess came, and Dowling "told him what had happened, and he said he would like to see [the locker]." Dowling "took him back and opened it up and showed him" the footlocker. The officer removed and inspected one of the packages. A federal narcotics agent then arrived, removed and examined the packages, and decided that the packages contained marijuana. 1/ The officers inquired about

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1/ The federal narcotics agent testified, Burgess did not. Dowling's testimony concerning the actions of Burgess is not challenged.

fill, to weigh down the emptied footlocker, and Dowling furnished ballast. Using the ballast and one brick of marijuana, the officers repacked the locker for shipment to San Francisco.

Dowling notified other airlines about McGrew and the shipment. About eight p.m. McGrew brought a blue footlocker, which he said contained books and dishes, to the Western Airlines freight service, where it was received by the freight clerk, one Case, who wrote up the airbill, and accepted the footlocker from McGrew. A fellow employee named Sweeney called United Airlines to tell them about the footlocker. The federal narcotics officer involved in the United Airlines transaction and two other officers went to the Western Airlines freight office. The footlocker was closed and locked. The federal narcotics agent "detected an odor of marijuana" by compressing the top of the footlocker and asked Sweeney and Case to open it, although they "were under no obligation to do so." Sweeney and Case opened the footlocker, on the suggestion of one of the officers, by knocking "the hinge pins out of the rear," using a hammer and nail. Sweeney opened up the lid, and the federal agent removed and opened the packages, which were wrapped in brown paper. The footlocker was then repacked in the same manner as the one checked with United Airlines.

About 11 p.m., McGrew returned to the Western Airlines counter, purchased a ticket for San Francisco, and checked a suitcase. Case notified officers and told them that he had last seen McGrew walking through the terminal in the direction of the restaurant. The officers, Case and Dowling, went to the restaurant and found McGrew sitting at the end of the counter. Both Case and Dowling identified him, and the officers placed

him under arrest. An officer found a Western Airlines baggage claim ticket in searching the person of McGrew. The officer returned to the Western Airlines luggage counter with the baggage claim ticket and secured the suitcase. He opened it and found marijuana.

The United Airlines employee, Dowling, testified that at the airlines training school he had been instructed that "we had the right to inspect shipments;" that an agent could open "anything that arouses your suspicions;" that the concern of the airlines was for "aircraft safety," for improperly declared goods going at a cheaper rate, and for overvalued goods, such as a TV set claimed to be good but in fact with "the picture tube . . . kicked in." He could not recall being instructed to check to see whether contraband was being shipped.

He testified in connection with the McGrew search that he was not concerned about aircraft safety or rate structures; that when he opened up the locker he was looking for one thing, to determine whether marijuana was contained in the locker. He did not, however, smell marijuana before opening the locker.

He further testified that in searching the footlocker he was following his orders to assist the police; that he suggested and furnished ballast to the police in response to their inquiry about fill, to weigh down the emptied footlocker and that in so doing he was following his orders to assist the police; that before the McGrew incident, he had opened two other footlockers, in the presence of the police, having obtained the combination to the locks from the police; that he found contraband in the two lockers, and that he knew of two other footlockers having been opened by fellow employees, in which contraband was not found.

The People stipulated that the officers did not have a search warrant for either search.

The trial court found that the United Airlines employee, in opening the footlocker, acted solely for police purposes and in response to police suggestion, and in reopening the footlocker in the presence of the police, acted solely for police purposes; that the information obtained from the United Airlines search led to the search of the footlocker at Western Airlines; that the Western Airlines employee who opened the footlocker acted solely for police purposes and at the request of the police; that the police had no warrant; that there was sufficient time to obtain a warrant; and and that the arrest of the defendant directly resulted from the searches of the United and Western footlockers. The court concluded that both searches were unlawful, the arrest was unlawful, and all evidence should be suppressed.

We find it unnecessary to determine whether Dowling, the United Airlines employee, must be considered an agent of the police in opening the footlockers because, even assuming that he was not, the subsequent searches by law enforcement officers or at their express and specific direction (cf. Stapleton v. Superior Court, 70 A.C. 101, 104), were unlawful and the evidence must be suppressed.

People v. Marshall, 69 Cal.2d 51, 57, makes clear that with certain exceptions, probable cause to believe that "a search will reveal contraband . . . does not justify a search without a warrant." Where there is probable cause, a warrant still must be obtained, absent an emergency, for a search not incident to a valid arrest even though a warrant would not be needed

for a search incident to an arrest. (e.g., People v. Harris, 62 Cal.2d 681, 682-683.)

The exceptions to the requirement of a search warrant, aside from searches incident to an arrest, are where there is a danger of " 'imminent destruction, removal, or concealment of the property intended to be seized' " or where the evidence is in plain sight, which "is, in fact, no search for evidence." (People v. Marshall, supra, 69 Cal.2d 51, 56-57, 61.)

Our decision in Marshall is not limited to dwelling houses. The Fourth Amendment protection of "effects" includes securely closed footlockers shipped through common carriers. Neither the language of the Fourth Amendment, nor of any of the cases interpreting the protection of that amendment, suggest that warrants apply to "houses" but not to "effects." The exceptions to the requirement of a warrant are bases on circumstances and not on categories of items. The requirement of a warrant, unless otherwise excused, applies to whatever is protected by the Fourth Amendment. (See Katz v. United States (1967) 389 U.S. 347, 356-367.)2/

2/ People v. Teal, 70 A.C. 532, is not to the contrary. Teal merely authorizes the search of an "automobile or other object," without a warrant, based on "reasonable belief that such object is itself evidence," but only when the seizure preceding the search is incident to a lawful arrest. (70 A.C. at p. 546; italics omitted.)

None of the exceptions apply to the United or Western Airlines searches of the footlockers. When the footlocker checked with United Airlines was searched by the police, McGrew "was neither present nor arrested until several hours after the search." (People v. Marshall, supra, 69 Cal.2d 51, 61.) His whereabouts were similarly unknown when the footlocker checked with Western Airlines was searched. Nor was there any likelihood that the lockers would be removed or the contraband destroyed; both footlockers were safely in the custody of the airlines. Both footlockers had been shipped on a "space available" basis, so that the airlines were not even under a contractual obligation to ship the footlockers before a warrant could be obtained.

The evidence was not in plain sight, since both lockers were closed when the police arrived, and the marijuana was wrapped in packages. "It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container of the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant." (People v. Marshall, supra, 69 Cal.2d at p. 59; see also People v. Hawkins, 273 A.C.A. 565, 569-570.) The People's reliance on People v. Roberts, 47 Cal.2d 374, People v. Ouellette, 271 A.C.A. 55, and People v. Anderson, 266 Cal.App. 2d 125, is misplaced. In those cases, the object was in plain sight; in Roberts a radio believed stolen, in Ouellette a corncob pipe and dark debris which was in a waxed paper bag, and in Anderson part of a marijuana cigarette.

The People contend that by shipping the footlocker with a common carrier under a "contract," the receipt

for the goods shipped which refers to but does not contain an inspection clause,3/ McGrew waived any Fourth Amendment protection that would otherwise attach to a closed and secure footlocker, and impliedly consented to the search by the airlines employee and by the police.

The People argue in effect that any waiver of Fourth Amendment protection, for whatever limited purposes, results in a waiver for all purposes. This contention was rejected in Corngold v. United States, supra, 367 F.2d 1, 7, also involving a search of baggage shipped through an airlines freight service.

Corngold relied on Stoner v. California (1964) 376 U.S. 483, 489, which rejected the contention that implied consent of access for any purpose results in consent for all purposes: "It is true . . . that when a person engages a hotel room he undoubtedly gives 'implied or express permission' to 'such persons as maids, janitors or repairmen' to enter his room 'in performance of their duties.' [Citation.] But the

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3/ The inspection clause on which the People rely is contained in C.A.B. regulations and states only:

"INSPECTION OF SHIPMENTS All shipments are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection." (Rules and Regulations, Issued November 8, 1967, C.A.B. No. 96, rule No. 24.) The basis for imputing knowledge of this rule is the rapid airbill (a receipt) which states in part on the back (in gray type): "2. It is mutually agreed that the shipment described herein is accepted . . . subject to governing classifications and tariffs . . . ."

conduct of the night clerk and the police in the present case was of an entirely different order."

In Corngold v. United States, supra, 367 F. 2d 1, the court ruled that "Appellant did not abandon his package; and mere surrender of custody to a carrier did not forfeit appellant's right to privacy. [Citations.] . . . Appellant's package, securely wrapped and tied, was delivered to the airline solely for transportation from Los Angeles to New York, and the inspection clause in TWA's tariff authorized examination only by the carrier itself." (367 F. 2d at pp. 7-8.)

Stoner and Corngold recognize that the scope of consent to an invasion of privacy depends upon the circumstances. Other cases involving implied limited consent to an invasion of privacy make clear the significance of the circumstances. Thus, in United States v. Blok (D. C. Cir. 1951) 188 F. 2d 1019, 1021, the police searched the desk of an employee; the court, in holding the search unlawful, stated: "No doubt a search of [the desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use." (See also, Cunningham v. Heinze (9th Cir. 1965) 352 F. 2d 1, 5, cert. denied, 383 U.S. 968, following Stoner. Compare searches properly within the implied consent to search in People v. Plane, 274 A. C. A. 1, 4 [landlord entered tenant's apartment to shut off lights and oven]; In re Donaldson, 269 A. C. A. 593, 594, [search of student's locker by school vice principal]; People v. Rightnour, 243 Cal. App. 2d 663, 666 [maid entered guest's room to clean up]; People v. Gonzales, 182 Cal. App. 2d 276, 277-278 [search of knife-wounded victim by hospital personnel to determine identity].)

That privacy is not an absolute concept, but depends upon the circumstances, was made clear by People v. Edwards, 71 A.C. 1141, 1149, where contraband in a trash receptacle was held protected against searches by the police, although, by placing the contraband in a trash receptacle, the defendants would have waived any claim to privacy as to the trash collector. The issue it was pointed out was the reasonable expectancy that property will be preserved from the intrusive scrutiny of others.

The same standard of reasonable expectancy used to determine zones of privacy determines the extent of implied consent to invade an individual's privacy. The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police in a search of his room. Similarly, in the instant case, McGrew might have expected that an airlines employee would inspect baggage where a danger or inconsistency was observed, but he could not reasonably be expected to anticipate police searches for contraband. He may not be held to have consented to searches by police officers totally unrelated to the interests of the airlines in the hope that contraband may be discovered. (Cf. Parrish v. Civil Service Commission, 66 Cal.2d 260, 274.)

It is also urged that the police search was nonetheless lawful, because the police reasonably and in good faith believed that the airlines employee could authorize a search of McGrew's luggage. The contention is without merit.

The rule governing searches based on consent by a third party was stated in People v. Hill, 69 Cal.2d

550, 554, certiorari granted 90 S.Ct. 112: "[A] search is not unreasonable if made with the consent of a third party whom the police reasonably and in good faith believe has authority to consent to their search . . . . " The operative word in the rule is "reasonably; "thus, there must be some objective evidence of joint control or access to the places or items to be searched which would indicate that the person authorizing the search has the authority to do so. (E.g., People v. Hill, supra, 69 Cal.2d 550, 554-555, and cases collected [visitor consenting to search of apartment]; People v. Gorg, 45 Cal.2d 776, 783 [owner; search of boarder's room]; People v. Linke, 265 Cal.App.2d 297, 315 [cotenant]; People v. Garner, 234 Cal.App.2d 212, 230 [wife; husband's property].)

The good faith mistake rule does not, however, apply where the third party makes clear that the property belongs to another. (E.g., People v. Cruz, supra, 61 Cal.2d 861, 866 [guest in apartment could not consent to search of boxes and luggage belonging to others]; People v. Egan, supra, 250 Cal.App.2d 433, 436 [parents could not consent to search of bag where made clear that bag not parents']; Holzhey v. United States (5th Cir. 1955) 223 F.2d 823, 824 [relatives could not consent to search of locked cabinet]; compare, Sartain v. United States (9th Cir. 1962) 303 F.2d 859, 862-863, cert. denied, 371 U.S. 894 [friend could consent to search of suitcase where defendant left suitcase with key attached].)

Moreover, the good faith rule does not apply where the relationship of the third party and the defendant makes clear that the defendant has not authorized the third party to act as his agent. Thus, in Stoner v. California, supra, 376 U.S. 483, 488, the Supreme Court,

in holding that a room clerk could not consent to the search of a guest's room, and rejecting the "claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search," stated: "[T]here is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room" (id., at p. 489).

The language and the rule of Stoner apply equally to the instant case: The police knew that someone had attempted to ship a footlocker which the airlines employee believed contained marijuana. They had no reason to believe that the shipper had authorized the employee to turn the trunk over to the police. Nor could the police rely on the right of the airlines to inspect goods shipped. As pointed out above, the consent to inspection by the airlines was limited to consent for inspection for the airlines' own purposes.

We conclude that the trial court properly suppressed the evidence obtained by the police searches of the footlockers.

It is also urged that, apart from the evidence furnished by the police searches, the officers had probable cause to arrest McGrew when he was found in the restaurant and that the search of his suitcase obtained from a Western Airlines clerk was a valid search incident to that arrest. However, apart from the matters learned from the police searches, the only information the police had at the time of the arrest was that McGrew had checked a footlocker at both United and Western Airlines, that the one checked at United, when opened

by the airline employee, was observed to contain several bricks or small packages wrapped in brown paper or newspaper, and that McGrew had checked a suitcase and purchased a ticket for San Francisco. The weight of the footlocker left with United was consistent with a shipment of two-thirds clothes and one-third books, the items McGrew had declared to be in the footlocker, and there is nothing to indicate that the package observed by the United employee were not entirely consistent with wrapped books. The fact that McGrew had checked pieces of luggage at three different times with two airlines is not incriminating, and we are satisfied that the information obtained by the officers apart from their unlawful search did not furnish probable cause to arrest McGrew for possession of marijuana and that arrest was unlawful. The search of the suitcase may not be sustained as incident to a valid arrest, and the evidence secured by that search was properly suppressed. This conclusion makes it unnecessary to consider whether the search of the suitcase occurred at the place of the arrest and was contemporaneous therewith. (Cf. People v. Cruz, supra, 61 Cal.2d 861, 865.)

Since the evidence secured by the police searches must be suppressed, there is not sufficient evidence to hold defendant for trial.

The order appealed from is affirmed.

PETERS, J.

WE CONCUR:

TRAYNOR, C. J.
TOBRINER, J.
SULLIVAN, J.

DISSENTING OPINION BY MOSK, J.

I dissent.

Section 11531 of the Health and Safety Code makes it a felony for any person to transport marijuana. The section applies not only to one who arranges shipment, as the defendant here, but it would also apply to any airline employee who knowingly transports marijuana. Thus if an airline employee reasonably believes a shipment contains a substance the transportation of which is illegal, he has the right and perhaps a duty to inspect the package or container. The purpose of such inspection is not to act as an agent of the police, but to insulate himself from any criminal culpability.

When the defendant arranged for the shipment of his footlocker he signed a "rapid airbill" which stated as one of the "conditions of contract" that it was accepted subject to governing classifications in effect on that date and filed in accordance with law. One of the Civil Aeronautics Board rules provides that "The carrier has the right, but not the obligation, to inspect shipments."[1/]

1/ This is not demonstrably certain from the evidence offered on this subject by the prosecuting attorney. A copy of C.A.B. regulation No. 96 (Exh. 10) and a copy of United Airlines Tariff rules (Exh. 11) were received in evidence. The former became effective on August 1, 1967, and the latter on December 8, 1967. The offense charged in this case took place prior to both dates: June 25, 1967. However, Dowling testified Exhibit 10 was similar to pages used by him in his daily work, and

(Continued on following page)

In People v. Edwards (1969) 71 A.C. 1141, this court indicated that in determining admissibility of evidence the significant criterion is the defendant's "reasonable expectation of privacy" in maintaining actual or constructive possession of the objects at issue. While undoubtedly this defendant hoped to avoid detection in shipping contraband, I find it difficult to conclude that he had a reasonable expectation of privacy when he shipped a footlocker by an interstate carrier which had a right of inspection given to it by the administrative agency regulating the airline and its operations. This defendant declared to one carrier he was shipping "clothing and books" and to the other he represented he was shipping "books and dishes." The rates charged for shipment were based on those representations, which were knowingly false. If, for any reason, an airline employee doubted the shipments contained the objects indicated, he had an unquestioned right to open the containers for inspection. This right of the airline is not diluted by the fact that contraband was discovered--which could not be shipped at any rate--rather than some legal perishable commodity, which could be shipped at a rate different from that prescribed for clothing, books

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(Continued from preceding page)

the prosecutor represented to the court "that is the actual regulation that was in effect at the time we are interested in." Defense counsel objected on numerous grounds to the admission of Exhibit 10, but he did not challenge the prosecutor's representation. The court must have accepted the prosecutor's statement as being factual for the exhibit was received in evidence; had it related only to dates subsequent to June 25, 1967, it would have been irrelevant.

and dishes.

To deny the airline through its employees a right of inspection when they doubt, for any reason, that a package contains the objects represented by the shipper to be therein, results in compelling the airline, an innocent third party, to blind itself to reality and thus to assist the defendant in his illicit commercial enterprise of transporting marijuana. This is the unfortunate result of the majority opinion.

The majority lean heavily on Corngold v. United States (9th Cir. 1966) 367 F.2d 1. In Corngold the transportation agent was initially contacted by government agents who directed him to a specific package and asked him to open it. Our case is factually closer akin to a more recent Ninth Circuit decision which carefully circumscribed the Corngold rule: Gold v. United States (1967) 378 F.2d 588, in which at pages 590-591, the court held Corngold inapplicable to a situation in which the transportation personnel, with "suspicions aroused . . . had no way to determine whether the contents were fit for carriage and properly classified except by opening them. This the carrier had the right to do under its tariffs." Indeed, the instant case is stronger than Gold, for here there was no prior direct contact between law enforcement officers and the airline employee. Dowling opened the footlocker at the direction of his company supervisor, not upon police suggestion.

It was not a law enforcement agency but Dowling who notified other airlines about the defendant and his shipment. Pursuant to that warning Western Airlines employees Case and Sweeney observed the defendant's footlocker and called United to report. Fortuitously the police had then arrived at United and they proceeded

from there to the Western offices. They noted the footlocker pointed out to them by the Western employees and could readily detect from it "an odor of marijuana." This justified the subsequent search and seizure. (See my dissent in People v. Marshall (1968) 69 Cal. 2d 51, 62.)

As this court recently held in People v. Superior Court (1969) 70 A.C. 129, 135: "The conduct of a person not acting under the authority of a state is not proscribed by the Fourth or Fourteenth Amendments of the federal Consitution. There are no state standards for 'search and seizure' by a private citizen who is not acting as an agent of the state or other governmental unit. Therefore, acquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable (People v. Randazzo (1963) 220 Cal. App. 2d 768, 775-776 [citation] cert. den. 377 U.S. 1000 [citations], and a motion to suppress evidence so obtained cannot be made on the gound that its acquisition constitutes an unreasonable search and seizure under section 1538.5."

Since the airline employees had a legal right to inspect the footlockers, I can see no impediment to their advising the police of the presence of contraband and to the police taking possession of and making evidentiary use of the contraband displayed to them. Indeed, that was the precise situation in People v. Superior Court (1969) supra, 70 A.C. 129, in which a private detective gave a copy of a tape recording to law enforcement officers. We properly declined to suppress the evidence prior to trial. To the same effect is Wolf Low v. United States (9th Cir. 1968) 391 F. 2d 61, 63, in which the court found proper the "conduct of the airline in turning over to the Government the fruits of its

search of the defendant's suitcases, and the conduct of the Government in making use of the information and evidence obtained by the airline's search . . . "

As the majority concede, People v. Hill (1968) 69 Cal.2d 550, 554, holds that a "search is not unreasonable if made with the consent of a third party whom the police reasonably and in good faith believe has authority to consent to their search . . . . " The police belief was entirely reasonable and in good faith here, since it was founded upon the right legally conferred upon the airlines to inspect shipments in their possession, the inspections actually made pursuant to that right, the discovery of contraband legally ineligible for shipment, the reporting of these events to the police and the disclosure to the police of the actual contraband.

I would hold the searches were valid, the suppression of evidence erroneous, and the defendant should be required to stand trial in order to ascertain his innocense or guilt.

MOSK, J.

WE CONCUR:

McCOMB, J.
BURKE, J.

APPENDIX "B"

Opinion of the Court of Appeal of the State of California

In the Court of Appeal of the State of California, Fourth Appellate District, Division One.

The People, Plaintiff and Appellant, vs. Kenneth T. McGrew, Defendant and Respondent, 4 Crim. No. 3278.

Filed February 17, 1969

APPEAL from an order of the Superior Court of San Diego County. Byron F. Lindsley, Judge. Reversed.

For Appellant: James Don Keller, District Attorney; Richard Bein, Deputy District Attorney.

For Respondent: George H. Chula.

The People appeal from a Penal Code, section 1385 order dismissing their action against Kenneth T. McGrew based upon the granting of McGrew's motion to suppress evidence (Pen. Code, §1238(7)).

McGrew was indicted for one count of transporting marijuana (Health & Saf. Code, §11531) and one count of possessing marijuana for sale (Health & Saf. Code, §11530.5). McGrew moved under Penal Code, section 1538.5 to suppress certain evidence which the People concede was indispensible to a conviction. The trial court granted McGrew's motion on the ground the

evidence was the product of illegal searches and seizures. The dismissal followed because the People conceded they had no case without the suppressed evidence.

Neither party gives this court any assistance with a narrative summary of the facts. The district attorney devotes over 20 pages of his brief paraphrasing the testimony of each witness in the order the testimony was produced at trial. This results in a disjointed, redundant, non-chronological, overextended and unsatisfactory presentation of the facts. McGrew adopts the People's presentation, stating it is adequate and he does not want to burden this court with a lengthy factual repetition.

About 4:00 p.m. Sunday, June 25, 1967, McGrew took a loaded 112 pound new black footlocker to the United Air Lines freight office at San Diego's Lindbergh Field for shipment to San Francisco. McGrew signed an airway bill as "Kent McGraw", stating the footlocker contained books and clothes. He consigned it to himself in San Francisco where he said he was destined on a midnight flight. McGrew said he would be back; he had more to ship which he could not put in his car at the same time as the black footlocker.

Charles J. Dowling, Jr., the United freight agent who waited on McGrew, suspected the footlocker contained marijuana. United Air Lines had had earlier experience with people shipping contraband. The airlines investigative unit had passed the word for freight handlers to be on the alert for new footlockers weighing 80 to 120 pounds, as marijuana had been shipped in such containers. In addition McGrew had appeared nervous, had long hair and looked like a "hippie."

Dowling did not know the origin of the warning to be alert for heavy new footlockers. He had heard "scuttlebutt" it may have come from Honolulu Police who had traced marijuana to a new footlocker air-shipped through United.

Dowling called his supervisor, told him his suspicions. The supervisor gave him permission to open the footlocker. Dowling knocked the pins out of the hinges on the locked footlocker, opened the top and saw several bricks (packages wrapped in brown paper) of what he thought was marijuana. A month earlier Dowling had been present when a similar footlocker was opened. He saw inside marijuana bricks wrapped in plastic. The brown paper wrapped packages appeared to contain the same substance as the marijuana he had seen earlier.

Dowling again called his supervisor and told him what he had found. The supervisor instructed him to call the police. About 5:00 p.m. a Mr. Burgess from the San Diego Police Department responded to Dowling's call. Dowling took him to the footlocker and showed him the contents. Other officers arrived, including State Narcotics Agent McLaughlin. The officers removed all but one marijuana brick and replaced them with ballast bags.

Dowling alerted the Western Airlines freight office and passenger ticket personnel to watch for McGrew and to call United if he were seen. Agent McLaughlin also contacted several airlines, furnishing McGrew's description.

About 8:00 p.m. McGrew took a different footlocker to the Western Airlines freight office for shipment to

San Francisco. McGrew again identified himself as "Kent McGrew", consigned the footlocker to himself in San Francisco, said the locker contained books and dishes and said he would be taking a midnight flight to San Francisco.

Richard Sweeney, a Western Airlines freight agent, called United Air Lines because of Dowling's warning. Within minutes narcotics agents including Agent McLaughlin arrived at Western. McLaughlin compressed the top of the footlocker and detected an odor of marijuana coming from it. He asked Sweeney and Joseph Case, the airfreight agent who had waited on McGrew, to open the footlocker. Sweeney removed the hinge pins, opened the footlocker, revealing brown paper wrapped Kilo marijuana bricks inside. All but one brick were removed and replaced with a sandbag and newspapers.

About 11:00 p.m. Case told Agent McLaughlin McGrew had just checked a blue suitcase at the Western Airlines ticket counter and purchased a ticket for San Francisco. Both Case and Dowling pointed McGrew out to McLaughlin in the airline terminal restaurant.

McLaughlin sat next to McGrew, showed his identification, said he was a State Narcotics Bureau agent, and asked McGrew's name. McGrew replied, "Kenneth McGrew." The agent gave McGrew a Miranda warning; McGrew said he understood it; McGrew admitted he had shipped a trunk that afternoon from the United Air Lines freight terminal. McLaughlin arrested him.

McLaughlin impounded McGrew's suitcase, searched it and found 18 more Kilo marijuana bricks.

At no time did the government agents act under authority of a search or arrest warrant.

The trial court suppressed: evidence of the two marijuana ladened footlockers and the marijuana filled blue suitcase; United and Western airway bills and a baggage claim check for the blue suitcase all of which McLaughlin found on McGrew's person; and McGrew's statements.

The trial court found Dowling acted as a police agent in opening the black footlocker at United Air Lines. The court reasoned agency resulted because the police had asked the airlines to assist in locating marijuana air shipments, and the footlocker opening was the direct and indirect result of police suggestion and instigation.

There was no evidence the police requested or ordered Dowling to open the footlocker. Dowling stated: "I opened it up on my own with no instructions from anyone except the permission of the supervisor to do it." Whether the suggestion airlines be on the alert for such footlockers originated from the police is immaterial. (The court's finding it did apparently rests on Dowling's testimony of "scuttlebutt".) The police do not necessarily make agents of citizens they warn concerning crimes. One who sees a wanted poster in a post office does not become an FBI agent should he later recognize the wanted suspect, interrogate him and hear incriminating admissions. A parent who heeds a police warning to be on the lookout for marijuana and dangerous drugs with children does not become a police agent when alertly emptying a teenage son's pockets to ready his clothing for the laundry.

While the Fourth Amendment's prohibition against unreasonable searches and seizures applies to the states and renders inadmissible in state courts evidence obtained in violation of that amendment, it does not apply to non-governmental searches by private individuals (People v. Superior Court, 70 A.C. 129, 135). Moreover, a motion to suppress evidence under Penal Code, section 1538.5 is directed solely to searches and seizures conducted by government agents (People v. Superior Court, supra, 70 A.C. 129, 134). Here Dowling did not act in a joint enterprise with, or as an agent of a governmental law enforcement agency. The government's participation, if any, fell short of coloring Dowling's conduct with the taint of governmental authority. (See Stepleton v. Superior Court, 70 A.C. 101, 103-106.) The trial court's finding Dowling acted as a police agent when he first opened the black footlocker is not supported by substantial evidence. We need not dictate whether Dowling had probable cause to search or whether the airline's tariff, which allows inspection of shipments, justified the search, because the Fourt Amendment does not make Dowling's discovered evidence inadmissible.

When Dowling, based upon his previous experience, recognized marijuana in the footlocker, his report to the police gave them probable cause to believe the footlocker contained contraband. Where the police have probable cause to believe an automobile contains marijuana they may make a warrantless search of it not incident to arrest. (Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 [88 S. Ct. 1472]; Carroll v. United States, 267 U.S. 132, 149 [45 S. Ct. 280, 283-284]; People v. Madero, 264 A.C.A. 126, 129.) The rule has its basis in the mobility of motor vehicles. In Carrol v. United States, supra, the rule was formulated, in part, upon an analogy to goods in the course of transportation, which Congress has historically treated

differently with regard to search authorization than it has goods in a fixed dwelling or other building. (Carroll v. United States, supra, 267 U.S. 132 at pp. 150-153 [45 S. Ct. at pp. 284-285].)

Here McGrew had placed the two footlockers and the suitcase in the course of transportation. One of two things was bound to happen unless the police seized them. Either they would be shipped out of the jurisdiction to San Francisco or the owner might return and remove the shipments from transit.

It is our opinion the rule allowing a warrantless search of motor vehicles, not incident to an arrest, where the police have probable cause to believe contraband is present, applies with equal reason to goods in the course of transportation. Support for this view is found in Hernandez v. United States, 353 F. 2d 624.

Having probable cause to search the footlocker at United Air Lines the police had equal cause to search the footlocker at Western Airlines. It was shipped by a person matching the description of the United shipper, who gave the same name and told the same travel plans.

When Dowling and Case identified McGrew in the restaurant as the shipper, the police had probable cause to arrest and search him. The search of the blue suitcase was justified both as incident to McGrew's lawful arrest and because the police had reason to believe it contained marijuana.

The trial court found there was sufficient time for the police to have secured search warrants for both the footlocker at United Air Lines and the footlocker at Western Airlines. We need not determine whether the

finding is supported where the shipments were made on a Sunday evening, each would have been shipped within three hours and McGrew could have withdrawn the shipments from the course of transportation. The finding is irrelevant. In Cooper v. State of California, 386 U.S. 58, 62 [87 S.Ct. 788, 791], the correct rule is stated:

> "It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.' "

The order of dismissal is reversed and the order suppressing evidence vacated.

GERALD BROWN, P. J.

WE CONCUR:

COUGHLIN, J.
WHELAN, J.

APPENDIX "C"

FOURTH AMENDMENT

Seizures, Searches and Warrants

[SECTION 1.] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX "D"

Civil Aeronautics Board of Regulation No. 96, Rule No. 24: "INSPECTION OF SHIPMENTS All shipments are subject to inspection by the carrier, but the carrier shall not be obligated to perform such inspection."